

Enclosed with my application is an excerpt of an article I published shortly after law school, *The Personal Question Doctrine*. The article is wholly my original writing and reflects comments and conversations with journal editors. The article proposes a novel approach to the problem of securing for individual women reproductive choice. *Roe v. Wade*, its progenitors, and its progeny, employed due process analysis. Undergirding those decisions is a vision of the Constitution's architecture of power based on dual sovereignty: if it is not for the federal government, it must be for the states to decide. The history of the Tenth Amendment and its animating principle, popular sovereignty, belie that vision. Rather, the Tenth Amendment envisions a system of *three* sovereigns, one natural, and two contrived: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." I propose an alternative, tripartite vision that would delegate to individual women the power to decide, based on the Tenth Amendment's explicit reservation of the power to decide such "constitutive" questions.

I begin the article by describing popular sovereignty's evolution in contradistinction to its British precursor. Next, I analyze *Chisholm v. Georgia*, 2 U.S. 419 (1793), a seminal yet often overlooked decision, in which Justices who were among the Constitution's drafters enunciate an inchoate, tripartite vision of popular sovereignty. Here, the excerpt ends. The article continues to trace popular sovereignty's adaptation as a tool to chart the frontiers of the powers of Americans' new governments, its abandonment following the Civil War, and its revival in the late twentieth century as dual sovereignty. The article next explores how, despite Justices' tinkering with popular sovereignty, its impulses registered elsewhere, animating such values as due process and Human Dignity. After surveying landscapes of history and of precedent, I challenge dual sovereignty head-on, demonstrating the flaws in its textual and historical foundations. Next, I resuscitate an interpretation of *Chisholm*'s fate lost to time and partisan machination: that *Chisholm*'s conception of popular sovereignty survives. Finally, I offer a preliminary sketch of the Personal Question Doctrine, its meaning, its function, and its contours.

THE PERSONAL QUESTION DOCTRINE

*By Ari Spitzer\**

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\* UCLA School of Law, J.D. 2021; Washington University in St. Louis, B.A. 2016. I am grateful to Professor Jennifer Chacon. Her insights and encouragement were invaluable to this project and to me. I am especially grateful to my father and mother, both of whose love and guidance carried me to today. I am also grateful to my student editors, whose herculean efforts improved this article immensely. Each error I made in writing this was a portal of discovery. Those, and those errors yet undiscovered, are my own. I hope you enjoy reading as much as I enjoyed writing.

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## INTRODUCTION

On January 18, 1892, thirty years before a woman would sit opposite the United States Senate lectern, Elizabeth Cady Stanton there delivered a speech entitled “Solitude of Self”:

Talk of sheltering woman from the fierce storms of life is the sheerest mockery, for they beat on her from every point of the compass, just as they do on man, and with more fatal results, for he has been trained to protect himself, to resist, to conquer. Such are the facts in human experience, the responsibilities of individual sovereignty. . . .

Whatever the theories may be of woman’s dependence on man, in the supreme moments of her life he cannot bear her burdens. Alone she goes to the gates of death to give life to every man that is born into the world. No one can share her fears, no one can mitigate her pangs; and if her sorrow is greater than she can bear, alone she passes beyond the gates into the vast unknown. . . .

We may have many friends, love, kindness, sympathy and charity to smooth our pathway in everyday life, but in the tragedies and triumphs of human experience each mortal stands alone.<sup>1</sup>

In her speech, Cady Stanton spoke in support of women’s suffrage about “self-sovereignty.” Denying a woman the right to vote, Stanton argued, denied her any role in the government of her own destiny, denied her all choice, and so all freedom. Stanton’s argument evokes the same argument Abraham Lincoln made against enslavement in Peoria, Illinois in 1854:

When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government—that is despotism. If the n[\*\*\*]o is a *man*, why then my ancient faith teaches me that “all men are created equal;” and that there can be no moral right in connection with one man’s making a slave of another.<sup>2</sup>

1 Elizabeth Cady Stanton, *Solitude of Self*, Address Before the Committee of the Judiciary of the United States Congress (Jan. 18, 1892), *reprinted in* SERIES V: PRINTED MATERIALS, 1850–1972, at 1–8.

2 Abraham Lincoln, Speech on the Kansas Nebraska Act at Peoria, Illinois (Oct. 16, 1854) (transcript available at POLITICAL SPEECHES AND DEBATES OF ABRAHAM LINCOLN & STEPHEN A. DOUGLAS 1854–1861, at 1 (Scott, Foresman, & Company 1896)).

Lincoln's ancient faith was in the timeless principles that the Framers forged during the Revolution.<sup>3</sup> Those principles' central concern was to keep the Revolution from its own undoing, to keep dissonant factions from dissolving the Union, to establish a republic worthy of ascent to empire across a continent, without setting into motion its descent into tyranny.<sup>4</sup>

The Framers' challenge was to scale their single political understanding across dispersed space. The Framers met that challenge by setting faction against faction, government against government, locked in a perpetual struggle, a static serenity.<sup>5</sup> Equipoise promised individual freedom, but depended on an antecedent proposition from which the Framers' precepts flow: the wellspring of ultimate power resides in the People, diffused among representative governments—Popular Sovereignty.<sup>6</sup> That power joins us in a dialogue across time with the Framers of the Constitution. It declares that in light of our lived experience, to realize the Constitution's original principles, the Constitution itself must change.<sup>7</sup> The Framers' generation enshrined that proposition in the Bill of Rights' Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>8</sup>

*Or to the people.*

Sovereign power is obvious in moments so vast—Revolution, Reconstruction, World War—they bend a whole nation's arc away from

3 I write this article to propose the Personal Question Doctrine. In the course of articulating that proposition, I rely on history—certain figures, narratives and ideas. Throughout, I present history honestly and, insofar as I can, objectively. I do so with few illusions. No bias is acceptable, but some is inevitable. The Framers, Cady Stanton, Lincoln, and every Supreme Court Jurist to whom I cite are human, prejudiced, and therefore cannot be wholly innocent in this regard. The same goes for the principles. "Individual freedom" for decades meant, indeed still means, freedom for some, not all. The Framers' "timeless principles" relied, in part, on a pervasive system of peculiar subjugation of segments of society, Black people and women especially. My purpose here is not to scrutinize and deconstruct all of the history I bring to bear to my argument, or even most of it. My purpose here is to sketch landscapes of history and to propose a concept within the confines of a single article. To that end, I invite you to traverse with me arduous, divisive terrain in hopes of further extending Sovereignty and tilting history toward liberation. At moments, moral judgment is necessary. Elsewhere, I made the editorial choice—right or wrong—to withhold it. Where I fall short, I consider it part of my own intellectual journey and moral education.

4 JOHN L. GADDIS, *ON GRAND STRATEGY* 173 (2018).

5 *Id.*

6 See THE FEDERALIST NO. 10 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Equipoise also depended, in practice, upon subordination of whole swaths of society, though a comprehensive account is beyond the parameters of this article.

7 See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (2000).

8 U.S. CONST. amend. X.

imperfect jurisprudence towards unalloyed justice. Sovereign power is less obvious in moments unknown and unrecorded. These are intimate moments which beg grave personal questions, whose answers constitute the threads of our moral identities, and whose answers' crushing burdens we each carry alone.

Consider the decision whether to bear or beget a child. A question fraught as it is estranging. A decision schismatic as war and seminal as revolution. Were it answered for you, you would be denied self-government at the moment it would matter most. The Tenth Amendment allocates to individuals the power to decide the question. Yet the prerogative to answer does not belong to the individual who bears the child. State legislatures all but decide.<sup>9</sup>

This article proposes a concept, the Personal Question Doctrine, to remand the decision of whether to bear or beget a child to whom it rightly belongs: the individual. The Personal Question Doctrine extends the Framers' experiment of distilling unity from faction, harmony from discord, to moments where politics and law fail to guarantee a woman's ability to stand in relation to men and to society as equal.<sup>10</sup>

Arriving at that long forestalled conclusion requires exposition of how individuals became alienated from reserved, sovereign power.<sup>11</sup> This

9 Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

10 See Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985). Throughout this article, I refer to individuals capable of bearing children as women. That is not to suggest that individuals who identify as women are the only ones among us who are capable of bearing children. The phrase is meant not to exclude, and to the extent possible, should be read to include.

11 Theories of old that have sought to do the same falter for want of workable criteria for discerning ordinary from extraordinary decisions. Some propose we follow the general pattern of the Framers' mandates, or their penumbras and emanations. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). Others propose we follow the First Amendment's injunction that church and state remain separate—that religion and conscience so thoroughly pervade these decisions that the First Amendment must be invoked to keep a civil government from entangling itself with ecclesiastical questions. Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 11 (1973). Each fails to withstand criticism, for example, that were a given right to trump all limits, then lawless force would prevail over the force of law, Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1938 n.174 (2004) [hereinafter *Lawrence v. Texas*]; Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28, 1 (2018), or even if a government affords individuals a choice it might yet withhold the means to decide. See, e.g., Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 1, 333 (1985). When the well thought out formulae of the past fail to provide the answer to a case which raises

article traces ideas' threads across time to show how, despite each successive generation of Supreme Court Justices' efforts at bending the Constitution to ideology, the impulses that animate our most hallowed precepts—Popular Sovereignty, Liberty, Equality, and Dignity—that sparked the Revolution and course still through our Constitution's text persevere.

Part I traces how Popular Sovereignty began as a creation myth and was reinvented into an altogether new species of institutional sovereignty. Part II then describes the Supreme Court's abandonment of Popular Sovereignty and turn to Due Process to protect individual freedoms. Part III recounts the rise of Human Dignity from the ashes of World War. Part IV invites the reader to examine that history in a new light. Part V offers a preliminary sketch of the Personal Question Doctrine, its meaning, and its contours. Tempting though it is to look past familiar history, careful observation of generations of Justices' tinkering reveals the grand designs long at work upon these precepts. Tracing these threads, our nation's intellectual sinews, reveals their beauty, complexity, and potential to remand Personal Questions to the People, and at long last to make real the idea of the Constitution.

## I. EVOLUTION OF POPULAR SOVEREIGNTY

Popular Sovereignty in the United States began as a story about how the Union came into being. Over decades, the idea assumed various semblances, and was set to various purposes. After it had shed its usefulness as an explanation of the metaphysical perplexities of Union, Popular Sovereignty became a mediator of the relationships between sovereign entities. After the Civil War all but proved the idea's uselessness as a binding agent among the Union's sections and as a protector of individual rights, Popular Sovereignty was consigned to desuetude, only to be revived once more.

### A. *Creation Myth*

Popular Sovereignty began as a creation myth, a constitutive fiction. Popular Sovereignty explained how thirteen separate peoples were bound up into one common People. It explained the reason the Constitution was legitimate. It explained consent.<sup>12</sup> The word "sovereignty" derives from

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problems of such fundamental importance, a woman's individual right to choose whether to terminate a pregnancy, it is time to pause and search for fresh concepts. Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787, 795 (1962).

12 *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324–25 (1816) (reaffirming

old French “sovrain” and Latin “super,” both meaning supreme.<sup>13</sup> British lore consolidated ultimate authority, legal and political, in the person of a monarch, the Crown.<sup>14</sup> In contrast to their British ancestors, Americans did not believe that providence placed any King or Queen at the center of the political universe. Americans believed that they, the People, by their consent, were the origin of political power. Although the phrase, “sovereignty” never appears in the Declaration of Independence or the Constitution, its presence permeates throughout.<sup>15</sup> Popular Sovereignty unites two rival ideas that undergird our system of government: self-government, and the few ruling the many.<sup>16</sup> Popular Sovereignty binds these two impulses in equipoise.

To Americans, the British mistook the majesty of the monarchy for the rationality of popular governance. Instead, Americans thought of Popular Sovereignty differently, rejecting the linkage of social rank with political power.<sup>17</sup> James Wilson, one of six individuals who signed both the Declaration of Independence and the Constitution, and a preeminent Founding-era American legal theorist, likened British notions of Popular Sovereignty to legends about the source of the Nile River. The Nile’s majesty was everyone’s to behold, yet its origin eluded even the greatest of monarchs. So enduring was its mystery that with each retelling, it thickened with fantasy. In time, humanity discovered the River’s true source: “a collection of springs small, indeed, but pure.”<sup>18</sup> Stripped of its veil of fantasy, Wilson taught, the true wonder of Popular Sovereignty becomes plain: “. . . the streams of power running in different directions, in different dimensions, and at different heights watering, adorning, and fertilizing the fields and meadows

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the Constitution’s Preamble’s fiction: that the “people of the United States” ably delegated sovereign authority as they deemed necessary and proper, and suggesting that there were specific “sovereign authorities” the People reserved to themselves).

13 Hugh Evander Willis, *The Doctrine of Sovereignty Under the United States Constitution*, 15 VA. L. REV. 437, 437 (1929).

14 Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 WM. & MARY BILL RTS. J. 291, 297 (2010).

15 In his speech in Peoria, Illinois, President Lincoln alluded to this principle, calling it the “sheet anchor of American republicanism.” Lincoln, *supra* note 2.

16 Sanford Levinson, *Popular Sovereignty and the United States Constitution*, 123 YALE L.J. 2644, 2653 (2014) (discussing the declaration of independence and the constitution).

17 See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 306 (1988).

18 JAMES WILSON, *Lectures on Law Delivered in the College of Philadelphia in the Years One Thousand Seven Hundred and Ninety, and One Thousand Seven Hundred and Ninety One*, reprinted in *THE WORKS OF JAMES WILSON* 67, 80–81 (Robert Green McCloskey ed., 1967); see also Jeremy M. Sher, Note, *A Question of Dignity: The Renewed Significance of James Wilson’s Writings on Popular Sovereignty in the Wake of Alden v. Maine*, 61 N.Y.U. ANN. SURV. AM. L. 591, 599–600 (2005).

. . . originally flow from one abundant fountain. In this [C]onstitution, all authority is derived from THE PEOPLE.”<sup>19</sup>

Enlivening that American myth required destroying its British precursor. As the origin of power, the British Crown intertwined human and institution as sovereign. In relocating that origin, Americans disentangled human from institution, breeding an altogether new species of governmental sovereignty. Americans crafted their founding political papers in the image of British colonial charters, licenses to form and operate business corporations under the British crown (e.g., the Massachusetts Bay Company Charter).<sup>20</sup> Americans’ analogy of corporate charter to political compact giving society organization based on consent suggests this new species’ key characteristic: that it is sovereign on certain terms. It can be bound, checked, divided, and diffused.<sup>21</sup> It is sovereign only in a derivative sense and within bounds. Outside them, true and natural sovereignty, indivisible and ultimate, resided in the People.

To make myth reality, Americans invented a ritual: the People assembled in conventions to consent to delegating sovereignty on certain terms, to ratify the Constitution. Virtual embodiments of the People, conventions wield sovereignty’s full measure of power.<sup>22</sup> The question a convention answers is about the first of first principles: whether to “alter or abolish” a form of government.<sup>23</sup> The question marks simultaneous rupture and continuity: the Constitution not only guides conventions’ procedure, it also submits to those conventions’ decisions. Legislatures craft positive law, law for everyday life. Conventions craft ultimate law, law against which all positive law is measured. The convention ritual embodies James Wilson’s idea of power’s origin. Constitutions control legislatures. The People control constitutions.<sup>24</sup>

19 James Wilson, Speech Delivered at the Convention of Pennsylvania (Nov. 26, 1787), in *THE WORKS OF JAMES WILSON VOLUME II*, 772 (Robert Green McCloskey ed., 1967).

20 Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1432–60 (1987).

21 *Id.*

22 *Id.* at 1459–60.

23 *Id.* at 1441, 1459 n.148 (Whereas Amar interprets the right to “alter or abolish” as a sort of legalized and channeled version of a more lawless-sounding right to revolution, I suggest it can be interpreted more broadly as a power to decide over questions of an ultimate nature. Whether a convention alters or abolishes a government belongs to this category of constitutive question, whether to meet one’s imminent demise on one’s own terms may be another.).

24 Sher, *supra* note 18, at 593, 596 (As Wilson explained to the Constitutional Convention of Pennsylvania in 1787: “the people may change the constitutions, whenever and however they please. This is a right, of which no positive institution can ever deprive them.”).

At the threshold of being, Americans conceived of Popular Sovereignty as a creation myth, made real by ritual, that explained the extraordinary decision to constitute thirteen separate polities and their populations as single People. Once that liminal moment had passed, so too did Americans' early understanding of Popular Sovereignty.

### B. *Chisholm Prelude*

The metaphysics of Union perplexed Americans. For all its grand rhetoric, the Federalist Constitution could not answer the most basic question: who among us can decide? Whom does the Constitution empower to answer these extraordinary, constitutive questions? In *Chisholm v. Georgia*,<sup>25</sup> the Supreme Court took up the question: who among us is sovereign?

*Chisholm* was a struggle over the Constitution that began as a squabble over a contract. In 1777, a merchant in South Carolina, Robert Farquhar, sold goods to the state of Georgia during the Revolutionary War. Georgia failed to pay the merchant before he died, and so the merchant's executor, Alexander Chisholm, sued in a federal trial court. The executor invoked the court's diversity jurisdiction in support of his claim in assumpsit, a type of breach of contract claim. Georgia defended that states are immune from suit in any court. Justice Iredell dismissed the executor's claim. Chisholm again filed suit, this time in the Supreme Court. Georgia refused to appear. The Court rejected Georgia's defense, that its status as sovereign gave it immunity, and thereby established the federal judiciary's power under Article III of the Constitution to hear controversies between states and citizens of other states.<sup>26</sup>

*Chisholm* was about far more than just a contract. In 1783, the Washington Administration sought to enforce a peace treaty with Great Britain.<sup>27</sup> The treaty assured British creditors of their power to collect debts that predated the Revolution.<sup>28</sup> In defiance of British creditors and federal efforts, however, states enacted laws expropriating British debts to support their local currencies.<sup>29</sup> If states could not be compelled to appear in federal court, British creditors would have to seek relief in hostile state courts.<sup>30</sup> To reach the question of Georgia's immunity defense, the Court had to decide

<sup>25</sup> See *Chisholm v. Georgia*, 2 U.S. 419 (1793).

<sup>26</sup> Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 62 (1989).

<sup>27</sup> *Id.* at 98.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Massey, *supra* note 26, at 98–101.

the question of sovereignty, and signal to the world that this new federal government could conduct its affairs.<sup>31</sup> Distinguishing American and British sovereignty, Chief Justice Jay, wrote in *Chisholm*:

In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents of Europe stand to their sovereigns.<sup>32</sup>

The People may occupy neither the legislator's seat nor the judge's bench. Still, the People are sovereign. Among the "great objects" which a national government is designed to pursue, he wrote, is to:

[E]nsure justice to all: To the few against the many, as well as to the many against the few. It would be strange . . . that the joint and equal sovereigns of this country, should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality.<sup>33</sup>

Assailing Georgia's defense, a governmental sovereign's attempt to don a cloak of immunity from suit by a natural sovereign, Chief Justice Jay expounded his conception of the Federalist Constitution's Popular Sovereignty:

[T]he Constitution places all citizens on an equal footing, and enable[d] each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and, because it brings into action and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded . . .<sup>34</sup>

31 See *Chisholm v. Georgia*, 2 U.S. 419 (1793).

32 *Chisholm*, 2 U.S. 419 at 472. Chief Justice Jay expounded on the differences between American and European permutations of Popular Sovereignty with distinct authority. Not only had served as ambassador to France and Spain, he had also presided over the Continental Congress. See *John Jay*, BRITANNICA, <https://www.britannica.com/biography/John-Jay> (Dec. 8, 2021).

33 *Chisholm*, 2 U.S. at 477.

34 *Id.* at 479.

*Chisholm* was the first time the Supreme Court interpreted the text of the Constitution—yet *Chisholm* is not a case most law students read, much less for its Tenth Amendment holding.<sup>35</sup> Perhaps because history subsumed *Chisholm*'s examination of Popular Sovereignty, a quintessential Tenth Amendment undertaking, into another Amendment's story. In 1795, the states ratified the Eleventh Amendment, repudiating *Chisholm*.<sup>36</sup> Recognizing the financial and political toll the Court's assertion of supremacy would exact on them, states rebelled at *Chisholm*. Within days of the decision's announcement, state legislatures resolved to amend the federal Constitution to undo *Chisholm*; Georgia's House of Representatives passed legislation rendering any judgment upon itself on behalf of Alexander Chisholm a felony punishable by "death, without the benefit of the clergy, by being hanged."<sup>37</sup> By 1890, the Court's own account of this history in *Hans v. Louisiana* took *Chisholm*'s, all of *Chisholm*'s, undoing as gospel.<sup>38</sup> The Eleventh Amendment overruled *Chisholm*.

Or so the story goes.

### C. *Reinvention of Popular Sovereignty as a Structural Principle—Federalism*

At the founding, Popular Sovereignty was a fiction that united dueling ideas of self-government and the few ruling the many; a fiction that gave meaning to representative democracy. *Chisholm* marked the passage of Popular Sovereignty from creation myth to instrument to chart the frontiers of power among governmental sovereigns: Federalism.

Sixteen years after *Chisholm*, the Supreme Court put Popular Sovereignty to a new use in *McCulloch v. Maryland*.<sup>39</sup> In 1816, Congress chartered the Second Bank of the United States.<sup>40</sup> In an attempt to raise revenue and wrangle federal authority, the state of Maryland taxed the Bank—a tax the Bank's Baltimore Cashier, James McCulloch, refused to pay.<sup>41</sup> Chief Justice Marshall concluded that the Constitution, without saying

35 Each Justice came close to invoking it, though none did. Sharon E. Rush, *Oh, What a Truism the Tenth Amendment Is: State Sovereignty, Sovereign Immunity, and Individual Liberties*, 71 FLA. L. REV. 1095, 1105 n.38 (2019).

36 The disagreement over *Chisholm*'s outcomes may explain why most first year Constitutional Law courses omit it entirely. See Randy Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1729–58 (2007).

37 Massey, *supra* note 26, at 111 (quoting AUGUSTA CHRON., Nov. 23, 1793) (reporting legislative action of Nov. 19, 1793).

38 See *Hans v. Louisiana*, 134 U.S. 1 (1890).

39 See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

40 *Id.* at 317.

41 *Id.* at 317–19.

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The Honorable Kiyo Matsumoto  
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Dear Judge Matsumoto:

I am a recent graduate of New York University School of Law and write to apply for a clerkship in your chambers for the 2025 term or any term thereafter. I have lived, worked, and studied in New York for the past six years, and will continue to work in New York as a Law Clerk at Sullivan & Cromwell beginning in September 2023. I am excited by the opportunity to serve my city and the federal judiciary as one of your law clerks. Please find enclosed my resume, law school transcript, writing sample, and letters of recommendation.

My writing sample is a paper I wrote considering the scope of constitutional parental rights. My argument explores how the Supreme Court's recent fundamental rights analysis erodes the already weak doctrine of parental rights, and why the Court's current case law does not support a parental right to ban particular topics from their children's public school curriculum.

Letters of recommendation from Professor Harry First, Professor Jonah Gelbach, and Professor John Sexton are enclosed. Prof. First, in whose seminar I wrote a paper about Amazon's liability for selling counterfeit products, can be reached at [harry.first@nyu.edu](mailto:harry.first@nyu.edu) or (212) 998-6211. I took a Statutory Interpretation seminar and served as a Teaching Assistant for Prof. Gelbach's Civil Procedure course. He can be reached at [gelbach@berkeley.edu](mailto:gelbach@berkeley.edu) or (202) 427-6093. Prof. Sexton, who can be reached at [js1@nyu.edu](mailto:js1@nyu.edu), was my Civil Procedure instructor and I was also a Teaching Assistant for his undergraduate course on government and religion. Professor Steve Shapiro, in whose seminar I wrote my writing sample, is a further reference who can be reached at [ss11538@nyu.edu](mailto:ss11538@nyu.edu).

If you have any questions or would like additional information about my background, please contact me at (862) 324-5467 or [rs3985@nyu.edu](mailto:rs3985@nyu.edu). Thank you very much for your consideration.

Respectfully,

/s/ Rachel Stewart

**RACHEL STEWART**

118 2nd Place, Apartment 2, Brooklyn, NY 11231 | (862) 324-5467 | rs3985@nyu.edu

**EDUCATION****NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY**

J.D., May 2023

Unofficial GPA: 3.69

Honors: *Robert McKay Scholar* (Top 25% of class after four semesters)*New York University Law Review*, Executive Editor

Institute for International Law and Justice Joyce Lowinson Scholar

Activities: Women of Color Collective, Finance Chair

International Law Society, Communications Chair

Professors Linda Silberman, Kenji Yoshino, and Noah Rosenblum, Research Assistant

**UNIVERSITY OF CAMBRIDGE, Cambridge, UK**

M.Phil. in World History, July 2017

Thesis: *The Kuling Hill Station as Colonial Space in China, c. 1895-1939*

Honors: Cambridge-Harvard Joint Centre for History and Economics Prize Research Student

**UNIVERSITY OF PENNSYLVANIA, Philadelphia, PA**B.A. in History and International Relations, *summa cum laude*, May 2016Thesis: *The "China Seat" and the Exception to Orderly State Succession in the United Nations*

Honors: Senior thesis awarded with honors, International Relations Honor Society

**EXPERIENCE****SULLIVAN & CROMWELL LLP, New York, NY***Summer Associate*, May 2022-July 2022 | *Law Clerk*, September 2023 (anticipated)

Participated in complex civil litigation matters and white collar investigations, including conducting research for and drafting outlines for two motions to dismiss.

**THE DOOR'S LEGAL SERVICES CENTER, New York, NY***Immigration Direct Services/Pro Bono Intern*, June 2021-August 2021

Conducted client intakes and counseled young people through completing immigration applications, including DACA, SIJS, and asylum applications. Researched DACA eligibility for NYC residents and challenges to the stop-time rule.

**AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, NY***Grant Writer*, September 2018-July 2020

Developed and managed grant proposals and reports for 20 foundations and individuals, securing \$10 million in annual donations. Maintained departmental knowledge and served as an organization-wide point of contact for the ACLU's work on LGBT+ rights, voting rights, conditions of confinement, and disability rights.

**MUSEUM OF CHINESE IN AMERICA, New York, NY***Grants & Programs Coordinator*, August 2017-September 2018

Created and managed a robust calendar of community-focused public programs, including Know Your Rights events, film screenings, and book launches. Wrote institutional grant proposals and reports that secured \$5 million in funding.

**NYC MAYOR'S OFFICE OF INTERNATIONAL AFFAIRS, New York, NY***Strategic Partnerships Intern*, May 2015-August 2015

Identified, developed, and executed partnerships between NYC agencies and the diplomatic community designed to highlight NYC's innovative work on a set of priority issues. Designed and installed at UN headquarters an exhibition on the history of the United Nations in New York City.

**ADDITIONAL INFORMATION**

Intermediate proficiency in Mandarin Chinese; beginner French. Enjoy baking cookies, cycling, and growing houseplants.

Name: Rachel Stewart  
 Print Date: 05/25/2023  
 Student ID: N16428142  
 Institution ID: 002785  
 Page: 1 of 1

**New York University  
 Beginning of School of Law Record**

**Fall 2020**

School of Law Juris Doctor Major: Law				
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor: Esther Hong				
Criminal Law		LAW-LW 11147	4.0	A-
Instructor: Rachel E Barkow				
Procedure		LAW-LW 11650	5.0	B+
Instructor: John Sexton				
Contracts		LAW-LW 11672	4.0	A
Instructor: Clayton P Gillette				
1L Reading Group		LAW-LW 12339	0.0	CR
Topic: Big Tech and Standard Oil				
Instructor: Christopher Scott Hemphill				
		AHRS	EHRS	
Current		15.5	15.5	
Cumulative		15.5	15.5	

**Spring 2021**

School of Law Juris Doctor Major: Law				
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor: Esther Hong				
Legislation and the Regulatory State		LAW-LW 10925	4.0	B+
Instructor: Roderick M Hills				
Torts		LAW-LW 11275	4.0	B+
Instructor: Barry E Adler				
International Law		LAW-LW 11577	4.0	A
Instructor: Jose E Alvarez				
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor: Christopher Scott Hemphill				
Financial Concepts for Lawyers		LAW-LW 12722	0.0	CR
		AHRS	EHRS	
Current		14.5	14.5	
Cumulative		30.0	30.0	

**Fall 2021**

School of Law Juris Doctor Major: Law				
Antitrust Law		LAW-LW 11164	4.0	A-
Instructor: Christopher Scott Hemphill				
Teaching Assistant		LAW-LW 11608	2.0	CR
Instructor: Jonah B Gelbach				
Constitutional Law		LAW-LW 11702	4.0	A
Instructor: Adam M Samaha				
Intellectual Property Crimes Seminar		LAW-LW 12451	2.0	A
Instructor: Harry First				
Intellectual Property Crimes Seminar: Writing Credit		LAW-LW 12491	1.0	A
Instructor: Harry First				
Research Assistant		LAW-LW 12589	1.0	CR
Summer 2021 Research Assistant				
Instructor: Linda J Silberman				
		AHRS	EHRS	
Current		14.0	14.0	
Cumulative		44.0	44.0	

**Spring 2022**

School of Law  
 Juris Doctor  
 Major: Law

Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A+
Instructor: Geoffrey P Miller			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			
Statutory Interpretation Seminar	LAW-LW 12252	2.0	A
Instructor: Jonah B Gelbach			
NYS Attorney General's Office – Antitrust Enforcement Externship	LAW-LW 12703	3.0	CR
Instructor: Bryan Bloom			
Amy McFarlane			
NYS Attorney General's Office – Antitrust Enforcement Externship Seminar	LAW-LW 12704	2.0	A-
Instructor: Bryan Bloom			
Amy McFarlane			
		AHRS	EHRS
Current		13.0	13.0
Cumulative		57.0	57.0
McKay Scholar-top 25% of students in the class after four semesters			

**Fall 2022**

Fall 2022				
School of Law				
Juris Doctor				
Major: Law				
American Legal History: The First Developing Nation?	LAW-LW 10820	4.0	A-	
Instructor:	Daniel Hulsebosch			
Property	LAW-LW 11783	4.0	B+	
Instructor:	Cynthia L Estlund			
Research Assistant	LAW-LW 12589	1.0	CR	
Instructor:	Kenji Yoshino			
Current Issues in Civil Liberties Seminar	LAW-LW 12610	2.0	A	
Instructor:	Steven Shapiro			
The President and the Administration	LAW-LW 12830	2.0	A-	
Instructor:	Noah Rosenblum			
		AHRS	EHRS	
Current		13.0	13.0	
Cumulative		70.0	70.0	

**Spring 2023**

School of Law Juris Doctor Major: Law				
Sexuality, Gender and the Law Seminar	LAW-LW 10529	2.0	***	
Instructor: Darren Rosenblum				
Law Review	LAW-LW 11187	2.0	***	
Teaching Assistant	LAW-LW 11608	2.0	CR	
Instructor: Maggie Blackhawk				
Federal Courts and the Federal System	LAW-LW 11722	4.0	***	
Instructor: Helen Hershkoff				
Research Assistant	LAW-LW 12589	1.0	***	
Instructor: Noah Rosenblum				
Labor and the Constitution Seminar	LAW-LW 12676	2.0	***	
Instructor: Cynthia L Estlund				
		AHRS	EHRS	
Current		13.0	2.0	
Cumulative		83.0	72.0	
Staff Editor - Law Review 2021-2022				
Executive Editor - Law Review 2022-2023				

**End of School of Law Record**

## TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW JD & LLM STUDENTS

*I certify that this is a true and accurate representation of my NYU School of Law transcript.*

### Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective Fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

<b>First-Year JD (Mandatory)</b>	<b>All other JD and LLM (Non-Mandatory)</b>
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
<b>Maximum for A tier = 31%</b>	<b>Maximum for A tier = 31%</b>
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
<b>Maximum grades above B = 57%</b>	<b>Maximum grades above B = 57%</b>
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

### Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

**Updated: 10/4/2021**

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

<i>Pomeroy Scholar:</i>	Top ten students in the class after two semesters
<i>Butler Scholar:</i>	Top ten students in the class after four semesters
<i>Florence Allen Scholar:</i>	Top 10% of the class after four semesters
<i>Robert McKay Scholar:</i>	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, or to LLM students.

#### Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

#### Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

**New York University***A private university in the public service*

School of Law

40 Washington Square South, 316  
 New York, New York 10012  
 Telephone: (212) 992-8040  
 Facsimile: (212) 995-4002  
 E-mail: john.sexton@nyu.edu

**John Sexton***President Emeritus, New York University**Dean Emeritus**Benjamin F. Butler Professor of Law*

March 8, 2023

**RE: Rachel Stewart, NYU Law '23**

Your Honor:

I write in support of the candidacy of Rachel Stewart for a clerkship in your chambers. I first met Rachel when she was a student in my Civil Procedure section in Fall Term 2020. In order to comply with Covid-19 health and safety guidelines while still providing some in-person interaction between students and professors, NYU Law School employed a hybrid teaching method, whereby one-third of the students attended in person while the remaining two-thirds participated remotely, rotating daily so the students were in person every third class meeting. It was in this challenging learning environment that I came to know Rachel.

Despite the challenging situation – indeed, by any measure – Rachel excelled in the class. She distinguished herself by her immediate willingness to engage with me regularly in class and to ask probative questions which often moved the class discussion forward in very unexpected and equally positive directions. Also, I engage with my students outside class, and I came to know Rachel and her dedication to the law through these casual encounters. Rachel's Teaching Assistants reported the same dedication to and involvement with the class and her classmates. I have a longstanding practice of asking my current roster of Teaching Assistants to recommend to me the TA's for the following semester; when it was time for them to recommend the new slate of TA's for the forthcoming year, Rachel was among those they recommended, and I was delighted to extend an offer to her. Unfortunately, we did not have the opportunity to work together in Civil Procedure; the Law School was hosting a faculty visitor and I volunteered to step aside so the visitor could teach Civil Procedure. However, I am delighted to report that Rachel and I worked together during this recent January Term in an advanced undergraduate seminar I teach on the intersection of government and religion at NYU's campus in Abu Dhabi.

This J-Term seminar met daily, and is academically rigorous (once described as not for the faint of heart). Taught as if it were a graduate seminar, the formative philosophy of the course is less about the actual material studied (which is in excess of 2,000 pages of unedited United States Supreme Court opinions) and more about the acquisition of the skills necessary to read, write, and think critically. Rachel embraced this philosophy and quickly immersed herself in the coursework and in her work with the students, leading small-group discussions

Rachel Stewart, NYU Law '23  
March 8, 2023  
Page 2

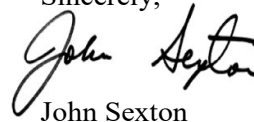
and meeting individually with students not only during recitations but also on her own time in the evenings and weekends to help them grasp the complexities of the subject material and craft their intensive weekly writing assignments. As a member of my teaching team, Rachel made it a priority to stay on top of things, not only the assignments and requests generated by me, but also her collaboration with her fellow Teaching Assistants and the needs of her students, constantly initiating contact and making herself available to discuss concepts, assignments, and scheduling.

Rachel's many activities and accomplishments are outlined on her resume and application materials, among which she has a sterling academic record (indeed, she is a McKay Scholar), a Justice Joyce Lowinson Scholar, and she is Executive Editor of the *Law Review*. However, it is important to note that Rachel's journey to legal education and the law is carefully considered and deliberate. She indicated to me recently that, following her graduate degree from the University of Cambridge, UK, she considered a career as a history professor, and took a job at the Museum of Chinese in America. She then moved to the ACLU, where she enjoyed not only being a part of the history of the institution but also which demonstrated to her more clearly her engagement with the law. There followed a stint at The Door's Legal Services Center and, most recently, as a Summer Associate at Sullivan & Cromwell. Each of these experiences, one building on the other, demonstrates Rachel's deliberative approach to the next step in her professional life.

Rachel clearly has the intellectual heft to successfully meet whatever challenges she faces. However, what is less obvious are the qualities that a person demonstrates simply by who they are rather than by their accomplishments. Everyone with whom I have seen Rachel interact – the students, my staff, and I – agrees that Rachel is affable, engaged and simply someone with whom it is easy and enjoyable to spend time.

I am confident that Rachel will be an ideal clerk: she is highly intelligent, knows how to work very hard but also knows how to manage her time and energy wisely. And, she is affable, engaged and an easy colleague with whom to work. I was talking to Rachel just this morning, and I know her application materials are forthcoming to your chambers. I trust you will find in her the same outstanding qualities which have so impressed me.

Sincerely,



John Sexton



**Jonah B. Gelbach**  
Professor of Law  
University of California, Berkeley  
School of Law  
788 Simon Hall  
Berkeley, CA 94720  
(202) 427-6093 (cell)  
gelbach@berkeley.edu

June 13, 2022

**RE: Rachel Stewart, NYU Law '23**

Your Honor:

I write to enthusiastically recommend **Rachel Stewart** for a judicial clerkship in your chambers.

I know Rachel through two channels. First, she was my teaching assistant for the 1L civil procedure course I taught in the Fall 2021 semester at NYU Law, where I was a Visiting Professor. Rachel was selected for this position, along with a handful of classmates, by her own 1L civil procedure professor, John Sexton, following Rachel's highly successful Fall 2020 performance. I inherited Professor Sexton's teaching assistants when he graciously stepped aside so that I could teach Procedure while visiting NYU.

The second way I know Rachel is that she was a student in my Statutory Interpretation Seminar in the Spring 2022 semester at NYU.

Rachel excelled in both capacities.

With regard to the Fall 2021 civil procedure course, I had a somewhat idiosyncratic system for teaching it, with TAs expected to carry out lots of different activities throughout each week. Some days they attended class, some days they drafted questions for students consider before class, and some days they drafted questions for students to consider after class meetings. TAs also did regular office hours with students and occasional review sessions, and they regularly interacted with me informally about varying course topics. Rachel did a great job at all of this, which speaks to her level of organization and dedication. I would gladly hire her again as a TA.

With regard to the Spring 2022 statutory interpretation seminar, this course focused on various theoretical approaches to statutory interpretation, beginning with legal process theory and working through contemporary approaches including various flavors of textualism, as well as recent alternatives emphasizing legislative process. Although it was a relatively large seminar, with 23 students, our weekly class meetings were largely focused on loosely structured student discussion.



Rachel Stewart, NYU Law '23  
June 13, 2022  
Page 2

Rachel made a number of excellent contributions in this setting, and I always looked forward to hearing from her.

The seminar course was also heavily based on written work, with each student preparing four response papers. In two of those, they were expected to pose a question for classmates about the week's readings, and then send me their own response to their own questions. In the other two response papers, students would simply respond to a classmate's question.

Rachel's questions for classmates were thought-provoking. Her responses to those questions, and to others', were outstanding. Her writing really pops, and I often found myself underlining a sentence and saying, "Right on!" as I read. Even in some cases where I disagreed on substance, I had to smile at how well she framed her points. Rachel's written work was not only engagingly written—it was also well structured, well argued, and carefully formatted. I'll point out what should now be obvious: Rachel earned an A in my course.

Given Rachel's performances as civil procedure TA and statutory interpretation seminar student, I am certain she will make a fabulous judicial clerk. To recap, she's well organized, incisive, a great writer, and super sharp.

Rachel's career interests include litigation, with interests in either or both of government work and impact litigation. Her clerkship experience no doubt will be an important part of building a foundation for either track. Rachel also has an unusually broad array of pre-law school background experiences, including summers working for the Senate Foreign Relations committee and the New York City Mayor's office, as well as longer stints in the museum world and at the ACLU. In law school she's been on the law review, done pro bono work, worked as an extern for the New York Attorney General's office, and will work as a summer associate at Sullivan & Cromwell.

Finally, Rachel is a delightful person to talk with. She has an easy, inviting way in conversation, as well as a fine sense of humor. She will be a pleasure to work with in chambers.

In sum, I am confident Rachel will be an excellent clerk at either the trial or appellate court level (she is interested in both). I recommend her enthusiastically and without reservation.

Yours,

*/s/ Jonah Gelbach*

Jonah B. Gelbach  
Professor of Law at Berkeley Law  
Visiting Professor of Law at NYU Law (2021-2022 Academic Year)



## New York University

*A private university in the public service*

School of Law  
Faculty of Law

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Professor Harry First  
Charles L. Denison Professor of Law

Dear Judge:

Rachel Stewart has requested that I write a letter of recommendation for her in connection with her application for a judicial clerkship. I recommend Ms. Stewart to you most highly and without reservation.

Ms. Stewart was a student in my seminar on Intellectual Property Crime in the fall of 2021. This seminar explores the extent to which the criminal law can be used to protect against the non-consensual appropriation of information, including information protected by copyrights, trademarks, and trade secrets. Our focus was mostly on a number of federal statutes relevant to these appropriations (including the Computer Fraud and Abuse Act), but also involved thinking about the nature of intellectual property rights, the effects of criminalization on incentives to innovate and on access to knowledge, and the costs and benefits of using the institutions of criminal enforcement instead of, or in addition to, civil liability. It's a challenging area and our class discussions around the seminar table were quite lively. Students do have their views about what should be considered "crime" in the digital world.

Rachel was one of the stand-out students in the seminar. She was an insightful participant in class, holding her comments until she had something useful to say that advanced the discussion. Where she truly excelled, though, was in the paper she wrote and presented for the course.

Rachel's paper was titled "Bad Actors: Counterfeit Products on Amazon.com." Rachel wrote the paper to address an apparent anomaly in intellectual property crime enforcement. Why do the owners of flea markets get criminally prosecuted (and imprisoned) for sales of counterfeit products made at their physical markets while the owners of the major digital platforms are never prosecuted for counterfeit sales made on their digital marketplaces? Rachel's paper carefully reviewed the various federal laws that might be applied to Amazon, including liability for aiding and abetting, but concluded, after a close examination of the case law, that Amazon does not meet the standards either for civil or criminal liability.

What I found particularly impressive about her paper was that she pushed beyond a doctrinal approach and examined the steps that Amazon has taken to deter the sale of counterfeits (relying in part on Amazon's 10-k filings). She also traced the way in which Amazon has responded to Congressional proposals and various federal enforcement efforts to successfully convince the public that it is victim rather than enabler when it comes to sales of counterfeits on its platform. She was careful not to draw a cynical view of this process, but her paper does offer a textured description of how a major corporation can avoid legal liability in ways that might not be open to defendants with lesser resources.

Rachel's performance in my seminar showed her strong research, writing, and presentation skills (she did a wonderful presentation of her paper to the seminar). I think these skills will serve her well as a judicial clerk. I also think that her performance demonstrated the mixture of academic skills and practical application that I see reflected in her record. An M.Phil. at Cambridge followed by a stint as a museum fundraiser and a grant writer at the ACLU. Academically, a statutory interpretation seminar as well as an externship with the Antitrust Bureau of the NY State Attorney General's office working on major monopolization litigation. And a truly outstanding academic record, made up mostly of "A" and "A-" grades.

When Rachel asked me whether I would be willing to write a reference letter for her, I asked her to tell me which type of clerkship she is looking for. Her response was that she sees the benefits of both a trial clerkship and a court of appeals clerkship. I think she hopes for both. That would be the blend of experience and intellectual challenge that she has always sought.

I think that Rachel is going to be an outstanding law clerk. She will come to you with some top-flight legal experience at Sullivan & Cromwell that will make her even more valuable as a law clerk. I hope you will talk to her and have the chance to see what I see. Of course, if I can provide any further information, please let me know.

Sincerely,  
Harry First  
Charles L. Denison Professor of Law

**RACHEL STEWART**

118 2nd Place, Apartment 2, Brooklyn, NY 11231 | (862) 324-5467 | rs3985@nyu.edu

I wrote this writing sample in my fall 2022 course on Current Issues in Civil Liberties & Civil Rights. The paper argues that, political rhetoric to the contrary, there is no robust (federal) constitutional doctrine of parental rights. I discuss how *Dobbs v. Jackson Women's Health Organization* further eroded the already weak parental rights framework, as well as the lack of case law supporting parents' rights to control their children's public school curriculum.

I spoke with Professor Steve Shapiro about the general topic for this paper but did not receive external edits or comments on it.

Nearly a century ago in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the Supreme Court recognized parents’ constitutional right to direct their children’s upbringing under the Fourteenth Amendment. But the Court never articulated the boundaries of that right, and *Dobbs v. Jackson Women’s Health Organization* has raised new questions about the future of the substantive due process cases flowing from *Meyer* and *Pierce*.

Against this changing legal background is a growing political debate about public school education. Parents’ roles in their children’s education have gained new salience as some parents target topics related to “critical race theory” (CRT), sexual orientation, and gender identity in K-12 curricula. CRT is a graduate-level academic discipline that is, broadly, interested in “studying and transforming the relationship among race, racism, and power,”<sup>1</sup> and there is no evidence that it is taught in schools.<sup>2</sup> But that has not stopped some politicians from attacking CRT as a proxy for virtually any school lesson that touches on systemic racism or white privilege, or parents from arguing that they have a right (at least) to exclude their children from classes on such topics. In a prominent example, then-candidate for Virginia governor Glenn Youngkin made parents’ rights a centerpiece of his campaign, specifically targeting the “poisonous” and “toxic” left-wing CRT doctrine that was forcing children to view the world through the “lens of race.” Youngkin promised to ban teaching CRT in schools on day one in office as part of his “parents matter” platform, which declared that parents “have a fundamental right to be engaged in [their] kids’ education.”<sup>3</sup> In a similar vein, Florida’s law that prevents teaching children about sexual orientation and gender identity, colloquially called the “Don’t Say Gay” law, is formally titled the “Parental Rights in

<sup>1</sup> RICHARD DELGADO AND JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3 (3d ed. 2017).

<sup>2</sup> Bryan Anderson, *Explainer: So Much Buzz, But What Is Critical Race Theory?*, AP (June 24, 2021), <https://apnews.com/article/what-is-critical-race-theory-08f5d0a0489c7d6eab7d9a238365d2c1>.

<sup>3</sup> Tim Hains, *Glenn Youngkin: “Parents Matter,” We Have a Fundamental Right to Be Engaged In Our Kids’ Education*, REALCLEARPOLITICS (Oct. 27, 2021), [https://www.realclearpolitics.com/video/2021/10/27/glenn\\_youngkin\\_parents\\_have\\_a\\_fundamental\\_right\\_to\\_be\\_involved\\_in\\_their\\_kids\\_education.html](https://www.realclearpolitics.com/video/2021/10/27/glenn_youngkin_parents_have_a_fundamental_right_to_be_involved_in_their_kids_education.html).

Education” law and invokes the “fundamental right of parents to make decisions regarding the upbringing and control of their children.”<sup>4</sup> These examples illustrate that “parental rights” is a potent political tool, but do not answer the question of whether parental rights have any legal significance in this context. The constitutional parental rights doctrine thus has new relevance not only because the Court has recently called into question the entire line of cases that built on *Meyer*, but also because of the renewed political fight for parents to control certain aspects of their children’s public school education.

This paper considers whether these political invocations of parents’ rights have any legal teeth under federal constitutional law. After arguing that parents’ rights were already weak and questionably “fundamental” rights before *Dobbs* in Part I, this paper discusses in Part II how *Dobbs* affects parents’ rights, and argues that *Dobbs*’ logic further erodes their shaky foundation. Part III explores how parental rights interact with ongoing debates about school curricula and concludes there is no constitutional basis for parents to control their children’s school curricula or to exempt their children from instruction on particular subjects based on moral or religious objections.

## I. PARENTAL RIGHTS BEFORE *DOBBS*

Before determining what is left of *Pierce* and *Meyer* after *Dobbs*, this Part discusses how the Court characterized those cases before *Dobbs*. It highlights two aspects of the Court’s parents’ rights cases to demonstrate just how thin and contested the doctrine was even before *Dobbs* intervened. First, *Pierce* and *Meyer* were part of the Court’s *Lochner* era, and the Court has struggled to articulate a workable premise for upholding *Pierce* and *Meyer* while distancing parental rights from *Lochner*-style reasoning. Second, *Wisconsin v. Yoder*, one of the canonical

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<sup>4</sup> 2022 Fla. Laws 22.

parental rights cases, actually relies more on the First Amendment, making it difficult to determine how important a freestanding parental right was to *Yoder* and in subsequent cases.

While *Meyer* and *Pierce* undoubtedly recognize parental rights, they both rely on *Lochner* v. *New York*, an “anticanon” opinion that the Court recently called an “unprincipled” and “discredited decision[]” that was the result of “freewheeling judicial policymaking.”<sup>5</sup> That decision struck down a state law that restricted how many hours bakers could work per week as an impermissible interference with the liberty to contract and symbolized the beginning of the Court’s economic due process era.<sup>6</sup> The Court applied *Lochner*’s concept of substantive due process in both *Meyer* and *Pierce*. In *Meyer*, the Court declared unconstitutional a statute that forbid teaching young children in any language besides English.<sup>7</sup> The opinion announced that the Fourteenth Amendment includes the right to “to marry, establish a home and bring up children.”<sup>8</sup> But Justice McReynolds did not rely on parental rights cases to support that conclusion; he instead listed a string of cases that sound in economic liberty or private property rights, including *Lochner*, *Allgeyer v. Louisiana*,<sup>9</sup> *Adams v. Tanner*,<sup>10</sup> and *Adkins v. Children’s Hospital*.<sup>11</sup> None of the cases cited in *Meyer* “provided any authority for a parental right to control the child, save by analogy to other models of private ownership.”<sup>12</sup> The opinion also mentions that the law wrongfully interfered with the teacher’s right to pursue his occupation (in this case, teaching the German language) and

<sup>5</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022). See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386 (2011) (describing the anticanon as “examples of how not to adjudicate constitutional cases.”).

<sup>6</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>7</sup> *Meyer v. Nebraska*, 262 U.S. 390, 397 (1923).

<sup>8</sup> *Meyer*, 262 U.S. at 399.

<sup>9</sup> 165 U.S. 578 (1897) (striking down a state law that prohibited foreign corporations).

<sup>10</sup> 244 U.S. 590 (1917) (striking down a state law that regulated employment agencies).

<sup>11</sup> 261 U.S. 525 (1923) (invalidating a minimum wage law that applied to women and children).

<sup>12</sup> Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1088 (1992).

the parents' right to hire that teacher to instruct their children<sup>13</sup>—that is, the teacher's and the parents' right to contract under the Fourteenth Amendment as interpreted in *Lochner*. The Court's opinion barely mentioned the religious and intellectual freedom arguments that were discussed during oral argument.<sup>14</sup> Two years later, the Court again applied *Lochner*-style reasoning when it struck down a compulsory public school statute in *Pierce v. Society of Sisters*.<sup>15</sup> In recognizing that *Meyer* established the “liberty of parents and guardians to direct the upbringing and education of children under their control,” the Court also relied on the rights of a private corporation to conduct business free from “arbitrary, unreasonable and unlawful interference” with their potential patrons.<sup>16</sup>

Because *Lochner* is firmly part of the Supreme Court's anticanon—cases that “embod[y] a set of propositions that all legitimate constitutional decisions must be prepared to refute”<sup>17</sup>—it is curious that *Pierce* and *Meyer* survived the demise of *Lochner* at all. The opinions' reliance on disfavored *Lochner*-style reasoning perhaps explains the Supreme Court's hesitance to return to the parental rights issue, as evidenced by the very few parental rights cases after *Pierce* and the Court's refusal to detail the scope of parental rights that outlived the end of *Lochner*.

Since overruling *Lochner*, the Court has had to recast *Meyer* and *Pierce* to deemphasize the portions dealing with liberty to contract and expand on those related to parents' rights. In doing so, the Court has struggled to agree on what the scope of those rights are, even questioning whether parental rights are truly “fundamental” rights. *Troxel v. Granville*, the last Supreme Court case to seriously consider the constitutional status of parents' rights, concerned a Washington statute that

<sup>13</sup> *Meyer*, 262 U.S. at 400.

<sup>14</sup> Woodhouse, *supra* note 12, at 1091.

<sup>15</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925).

<sup>16</sup> *Id.* at 534-36.

<sup>17</sup> Greene, *supra* note 5, at 380.

allowed any person to petition for a court-ordered right to see a child against their custodial parent's objection.<sup>18</sup> The Washington Supreme Court, citing *Pierce* and *Meyer*, noted that the Supreme Court had recognized parents' fundamental right to autonomy in child rearing decisions and applied the usual strict scrutiny test. After identifying the state's compelling interest in protecting children from serious harm, the Washington Supreme Court held that the statute was facially unconstitutional because it was not narrowly tailored to that end.<sup>19</sup>

The Supreme Court took the unusual step of affirming the Washington court's judgment on alternative grounds. The plurality opinion did not apply strict scrutiny, but rather held that the "sweeping breadth" of the Washington statute was unconstitutional as applied in this case.<sup>20</sup> The Court noted that the trial court did not identify any "special factors that might justify the State's interference with Granville's [the children's mother] fundamental right to make decisions" about her daughters' upbringing.<sup>21</sup> Despite granting certiorari on the question of whether a "parent's fundamental right to autonomy in child rearing decisions is unassailable" and whether the state's interests are "invoked absent a finding of harm to the child or parental unfitness,"<sup>22</sup> the Court did not elaborate what "special factors" might warrant overcoming the presumption of parental fitness and declined to define the "precise scope" of parental rights in the visitation context, including whether avoiding harm to the child is necessary to overcome the parent's decisions about third-party visitation.<sup>23</sup> The opinion left open which non-parental interests matter, and what degree of deference a parent's visitation decisions should receive. Given the opinion's departure from the doctrine and reasoning in the Washington high court's decision, the Supreme Court seems to have

<sup>18</sup> See *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>19</sup> *In re Custody of Smith*, 137 Wash. 2d 1, 5 (1998).

<sup>20</sup> *Troxel*, 530 U.S. at 73.

<sup>21</sup> *Id.* at 68.

<sup>22</sup> Brief for Petitioner at I, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138).

<sup>23</sup> *Troxel*, 530 U.S. at 73.

purposefully avoided applying the standard test it uses for fundamental constitutional rights. The Court either dodged whether parental rights receive strict scrutiny or did not have enough votes to apply it, neither of which suggest that *Pierce* and *Meyer* are ironclad precedents.

Three dissenting opinions further demonstrate how divided the justices were on the scope of parental rights. Justice Stevens argued that the Court should have squarely confronted the parental rights' issues in the case and made clear that parental rights "should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child."<sup>24</sup> That is, Justice Stevens would have balanced the parents' fundamental rights against the child's best interests. Justice Kennedy similarly argued that parents' rights may be limited by third parties who have a long-established relationship with the child.<sup>25</sup> Justice Scalia went much further in writing that *Pierce* and *Meyer* did not identify a fundamental right under the Fourteenth Amendment and that the five different opinions in *Troxel* suggested that the theory of unenumerated parental rights had a "small claim to *stare decisis* protection."<sup>26</sup> Thus Justices Stevens, Kennedy, and Scalia implicitly recognized competing interests that could affect parental rights without applying strict scrutiny or labeling those interests "compelling." The plurality opinion, as mentioned, did nothing to refute these implications, and left open what interests besides the parents' mattered. While Justice Scalia was alone in calling for *Pierce* and *Meyer* to be overruled, *Troxel* is significant because the Court refused to apply strict scrutiny or to specify the scope of the parental rights that all justices except Scalia insisted were fundamental. This departure from the standard fundamental rights analysis is indicative of the Court's lack of clarity about what parental rights entail.

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<sup>24</sup> *Id.* at 89 (Stevens, J., dissenting).

<sup>25</sup> *Id.* at 98 (Kennedy, J., dissenting).

<sup>26</sup> *Id.* at 92 (Scalia, J., dissenting).

A second important feature of parental rights doctrine is that a seminal parents' rights case is also (and primarily) a seminal First Amendment case. As Justice Scalia noted in *Troxel*, there are only three Supreme Court cases that rest in whole or in part on the fundamental rights of parents to direct their children's upbringing.<sup>27</sup> And one of those cases, *Yoder*, was decided principally on First Amendment grounds.<sup>28</sup> Justice Burger even wrote in *Yoder* that a parental rights claim "may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations."<sup>29</sup> The parental rights portion of *Yoder* did not clearly sharpen or extend parental rights doctrine, leaving only *Meyer* and *Pierce* to stand for some version of constitutional parental rights. Thus even before *Troxel*, parents' rights were not a robust, freestanding basis for a claim, which also explains why so many cases subsequent to *Pierce* and *Meyer* that invoke parental rights fortify their claims with First Amendment claims.<sup>30</sup> As *Dobbs* has shown the current Court's interest in revisiting the origins of unenumerated fundamental rights, the Court, if compelled to return to parents' rights, might find that *Pierce* and *Meyer* are unnecessary to protect parents' rights in light of developments in First Amendment doctrine.

Leading up to *Dobbs*, the Court's parental rights doctrine was based on two precedents that invoked the *Lochner* anticanon of constitutional law. The Court saved *Pierce* and *Meyer* from the end of the *Lochner* era, but never wrestled a majority to explain why, or what the contours of parents' rights entailed. *Dobbs* strengthens the case for overturning *Pierce* and *Meyer* altogether.

<sup>27</sup> *Id.* Those cases are *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205, 232-233 (1972).

<sup>28</sup> *Yoder*, 406 U.S. at 214. For a discussion of *Yoder*, see *infra* Part III.

<sup>29</sup> *Id.* at 215.

<sup>30</sup> Parents' rights claimants invoked the First Amendment even before *Yoder*. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 164-67 (1944) (invoking both parental rights and freedom of religion claims); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (citing the First Amendment as the basis for the "right to educate a child in a school of the parents' choice" and "the right to study any particular subject or any foreign language."). For further discussion, see *infra* Part III.

## II. PARENTAL RIGHTS AFTER *DOBBS*

The logic of *Dobbs* either calls for *Meyer* and *Pierce* to be overruled or limited to their facts. This Part argues that the Court’s assertion that *Dobbs* does not jeopardize other substantive due process cases is not convincing. It then applies the Court’s history and tradition test to existing parental rights doctrine and finds that *Meyer* and *Pierce* would not survive that test. It closes by arguing that *stare decisis* factors would also not save *Meyer* and *Pierce*.

Contemporary substantive due process traces back to *Pierce* and *Meyer*.<sup>31</sup> Because *Dobbs* overturned longstanding substantive due process precedents, the future of the doctrine depends in part on how courts interpret *Dobbs*. In *Dobbs*, Justice Alito attempted to distinguish *Roe* and *Casey* from other cases involving unenumerated rights on the basis that abortion alone involves “potential life.”<sup>32</sup> But that distinction only matters as long as a majority of justices believe it does, particularly because the Court did not discuss what “potential life” includes. For example, if the state’s interest in protecting potential life stems from a fetus’s lack of autonomy and decision-making abilities, it is not obvious why “potential life” would exclude young children, who are also generally not empowered to make basic decisions for themselves. Although this argument seems absurd, the Court might be wary of going too far in the other direction and making a sharp distinction between potential life and life. Such a line would suggest that a fetus is distinct from a living person and perhaps not entitled to the type of rights that a living person has. Absent the Court clarifying the boundaries of potential life, there is no principle stopping the Court from deciding that other substantive due process cases involve “critical moral question[s]” as important as those raised in *Dobbs*.<sup>33</sup> Justice Thomas has already agreed in principle with Justice Scalia’s argument in *Troxel*

<sup>31</sup> See, e.g., Woodhouse, *supra* note 12, at 997 (describing *Pierce* and *Meyer* as the “good personal liberty gold of substantive due process left when the evil dross of economic due process was purged.”).

<sup>32</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2280 (2022).

<sup>33</sup> *Id.*

for overturning *Pierce* and *Meyer* by calling for the Court to overturn all substantive due process cases.<sup>34</sup> Nothing in the *Dobbs* opinion limits its logic to the abortion context except for Justice Alito's bare assertion.

Assuming that *Dobbs* is not limited to the abortion context, the question is then how *Dobbs* affects parental rights. As discussed above, the Court has long affirmed some unenumerated parental right with regard to making decisions about the care, custody, and control of their children. But there are at least two issues in upholding *Meyer* and *Pierce* under the *Dobbs* "history and tradition" test. The first is that neither case engaged in any historical analysis about the scope of parental rights. The second is that the Court has recognized an evolving history and tradition of parental and family relationships over the last thirty or so years—which is emphatically not the type of history and tradition the Court now finds relevant in identifying a fundamental right.

*Dobbs* crystallized the test for identifying unenumerated fundamental rights. As Justice Alito wrote, the Court considers whether the proposed right is "deeply rooted" in "history and tradition" and whether it is essential to our "scheme of ordered liberty."<sup>35</sup> In applying that test, Justice Alito marshalled an "unbroken tradition of prohibiting abortion on pain of criminal punishment"<sup>36</sup> throughout the history of the common law and found that the concept of ordered liberty did not authorize the Court to "decide how abortion may be regulated in the States."<sup>37</sup> The Court's "history" is based on formal legal sources and ends somewhere before 1900, as indicated by the opinion's emphasis on early American laws and common law authorities like Blackstone and Coke, as well as its refusal to consider twentieth century developments.<sup>38</sup>

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<sup>34</sup> *Id.* at 2301-02 (Thomas, J., concurring).

<sup>35</sup> *Id.* at 2246.

<sup>36</sup> *Id.* at 2253.

<sup>37</sup> *Id.* at 2259.

<sup>38</sup> *Id.* at 2248-56.

The *Meyer* and *Pierce* decisions do not rest on this version, or any version, of history and tradition. The *Dobbs* court inveighed against earlier cases that identified fundamental rights without scrutinizing the history and tradition that the Fourteenth Amendment drafters would have relied on. But *Meyer* and *Pierce* engage in exactly this type of “unprincipled” reasoning, invoking everything from the Plato’s philosophy of education,<sup>39</sup> to parents’ assumed “high duty” to prepare their children for adulthood,<sup>40</sup> rather than considering historical or common law sources.

Even assuming that the Court would recognize some version of a history and tradition of parental rights with regard to their children’s upbringing, the Court’s precedents have neither imagined that right to be unlimited nor limited *Pierce* and *Meyer* to their facts. But because *Dobbs* offered no guidepost for identifying the proper level of generality in evaluating the historical scope of an unenumerated right, it is not even clear how to begin applying the *Dobbs* test to the parental rights concept. A quick review of parents’ rights in the 1800s raises questions about how the Court would conduct a history and tradition analysis in this context. Children in the founding era were akin to parental property, particularly patriarchal property.<sup>41</sup> Until the mid-1880s, fathers had the right to use their children’s labor or hire it out, exclude male suitors from courting their daughters, and sole testamentary power to appoint a guardian for their children other than their mother.<sup>42</sup> It is nearly inconceivable that the Court would recognize these forms of parental rights today, not least because many of them depended on the mother’s lack of an independent legal status under coverture.<sup>43</sup> And because modern public schools did not exist until relatively recently, there is also no founding era history and tradition of parents’ rights to control their children’s public school

<sup>39</sup> *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923).

<sup>40</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

<sup>41</sup> Woodhouse, *supra* note 12, at 1042-43.

<sup>42</sup> *Id.* at 1045-46.

<sup>43</sup> Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. REV. 1, 29-37, 50-51 (discussing the history of fathers’ property rights in their children and the parallel evolution of marriage from coverture to formal legal equality).

curricula. The *Meyer* and *Pierce* opinions do not engage in the version of historical analysis that the Court requires under *Dobbs*, and, if they did, the results at a high level of generality are alien to a 2022 audience, and there would be no common law or statutory sources regulating a parent's involvement in forming their children's public school curricula. Absent further direction from the Court on how to identify a potential fundamental right, there is no basis for upholding the rights that *Meyer* and *Pierce* only arrived at through "unprincipled" reasoning.

The second difficulty with applying the *Dobbs* test to parental rights is that the history and tradition of parental rights the Court has recognized would not withstand the restrictive *Dobbs* test. The cases that have engaged with the history of parental rights have done so using a now disfavored strand of the Court's history and tradition analysis. In *Troxel*, the Court acknowledged parents' evolving role in their children's upbringing: "The demographic changes of the past century make it difficult to speak of an average American family. . . . [G]randparents and other relatives undertake duties of a parental nature in many households."<sup>44</sup> The Court went on to note that the "nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family."<sup>45</sup> Fifteen years later, in recognizing that same-sex couples have the right to marry, the Court held that the right to marry is underpinned by the "related rights of childrearing, procreation, and education."<sup>46</sup> The Court noted that all parties recognized that same-sex couples were loving and supporting parents to their children, and the traditional function of marriage as providing a stable and permanent structure for children applied equally to same-sex parents as to opposite-sex parents.<sup>47</sup> In both *Troxel* and *Obergefell* the Court acknowledged versions of parental rights that are not traditional: the

<sup>44</sup> *Troxel v. Granville*, 530 U.S. 57, 63-64 (2000).

<sup>45</sup> *Id.* at 64.

<sup>46</sup> *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015).

<sup>47</sup> *Id.* at 668-69.

nonparental visitor’s right to continue a relationship with a child against their parent’s wishes, and the right of same-sex couples to parent. These findings are inconsistent with *Dobbs*’ command to adhere to eighteenth and nineteenth-century sources in a fundamental rights analysis. Subjecting parental rights to the *Dobbs* test would therefore require the Court to backtrack on its promise to not revisit *Obergefell* or accept that twentieth century history is relevant to the “history and tradition” test.

The *stare decisis* factors provide little support for upholding *Meyer* and *Pierce*. The Court has recently grappled with the *stare decisis* factors,<sup>48</sup> but the *Dobbs* court relied on: “the nature of their error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.”<sup>49</sup> Four of the five factors point to overturning *Meyer* and *Pierce*. As discussed above, neither case grounded its analysis on Constitutional text, history, or (current) precedent,<sup>50</sup> and were thus “far outside the bounds of any reasonable interpretation of the various constitutional provisions” to which they pointed.<sup>51</sup> Likewise, *Pierce* and *Meyer* have not always been “applied in a consistent and predictable manner.”<sup>52</sup> *Griswold* interpreted those cases for the proposition that the state cannot “consistently with the spirit of the First Amendment, contract the spectrum of available knowledge,”<sup>53</sup> even though neither *Pierce* nor *Meyer* mentions the First Amendment at all. Additionally, as already discussed, the Court has declined to follow strict scrutiny in parental rights cases, muddying the scheme the Court applies to fundamental constitutional rights, and used

<sup>48</sup> *Ramos v. Louisiana*, 140 S. Ct. 1390, 1440 (2020) (Kavanaugh, J., concurring) (“[T]he Court has articulated and applied” *stare decisis* factors “without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together.”).

<sup>49</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022).

<sup>50</sup> *Id.* at 2266 (explaining the “quality of the reasoning” factor).

<sup>51</sup> *Id.* at 2265 (applying the “nature of the Court’s error” factor).

<sup>52</sup> *Id.* at 2772 (interpreting the “workability” factor).

<sup>53</sup> *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

*Pierce* and *Meyer* as the basis for identifying “penumbral” rights that the Court recently decried as “facially absurd.”<sup>54</sup> The Court would thus find that *Pierce* and *Meyer* have distorted not only parental rights doctrines but also the entire framework for analyzing constitutional rights.<sup>55</sup>

Reliance interests are arguably the only *stare decisis* factor that supports upholding *Meyer* and *Pierce*. Reliance interests are those “where advance planning of great precision is most obviously a necessity.”<sup>56</sup> Parents’ rights to make decisions regarding their children’s upbringing certainly fall within that scope. But, as noted previously, in the last Supreme Court case to seriously consider constitutional parental rights, Justice Scalia remarked that the “sheer diversity” of opinions in the case suggested that the “the theory of unenumerated parental rights” has actually not “induced substantial reliance” and had a small claim to *stare decisis* protection.<sup>57</sup> *Stare decisis* is weakest in Constitutional interpretation,<sup>58</sup> and one potential supporting *stare decisis* factor is hardly firm ground for upholding *Pierce* and *Meyer*.

### III. PARENTAL RIGHTS IN THE SCHOOL CURRICULUM CONTEXT

As a practical matter, the Court is unlikely to strike down *Pierce* and *Meyer*, regardless of what the logic of *Dobbs* instructs. For starters, they are less politically contentious cases compared to *Roe* and *Casey*; few would disagree that parents have some type of rights with regard to their children’s upbringing and education. As Justice Brennan wrote in 1989, “I think I am safe in saying that no one doubts the wisdom or validity” of *Meyer* and *Pierce*.<sup>59</sup> And the fact remains that they are Supreme Court precedents in a political landscape with a renewed focus on “parental rights.”

<sup>54</sup> *Dobbs*, 142 S. Ct. at 2301 (at asterisk).

<sup>55</sup> *Id.* at 2275 (describing the “effects on other areas of the law” factor as whether the case has distorted “important but unrelated legal doctrines”).

<sup>56</sup> *Id.* at 2276 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992)).

<sup>57</sup> *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting).

<sup>58</sup> *Dobbs*, 142 S. Ct. at 2262.

<sup>59</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 163 (1989) (Brennan, J., dissenting).

The remainder of this Part considers what relevance *Pierce* and *Meyer*, as legal doctrine, have to ongoing debates about parents' rights in the context of school curriculums. Parents' rights advocates, in addition to supporting bills like Florida's Parental Rights in Education law, argue that they have the right to exclude certain sensitive topics from the school curriculum, or at the very least have the right to exempt their child from lessons on those subjects.<sup>60</sup> This section explains why they have neither as a matter of federal constitutional law.

Neither *Meyer* nor *Pierce* suggests that parents have the right to direct the public school curriculum. In *Meyer*, the Court remarked that the case did not challenge "the State's power to prescribe a curriculum for institutions which it supports."<sup>61</sup> Similarly, in *Pierce*, the Court noted that the case did not question the "power of the State reasonably to regulate all schools."<sup>62</sup> *Pierce* does not support the "contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society."<sup>63</sup> Both cases recognize that when parents decide to send their children to public schools, they implicitly delegate some control over their children's education to the state. Parents always retain the right to send their children to private schools,<sup>64</sup> and to supplement a public school curriculum in formal and informal ways,<sup>65</sup> but *Meyer* and its progeny do not support a freestanding parental right to control the public school curriculum.

<sup>60</sup> See, e.g., Claire Cain Miller & Francesca Paris, 'Channeling the Mama Bear': How Covid Closures became Today's Curriculum Wars, N.Y. TIMES (Nov. 7, 2022), <https://www.nytimes.com/2022/11/07/upshot/school-curriculums-survey-lgbtq.html>.

<sup>61</sup> *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

<sup>62</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

<sup>63</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972).

<sup>64</sup> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." *Pierce*, 268 U.S. at 535.

<sup>65</sup> Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 NEB. L. REV. 290, 339-40 (2010) (characterizing the fundamental right in *Meyer* as the right of the parent, "after he has complied with all proper requirements by the state as to education, to give his child such further education in proper subjects as he desires and can afford.").

Multiple circuit courts have refused to include a right to exclude particular topics from school curricula under the umbrella of parental rights. In holding that parents' fundamental right to direct his children's education was not abridged by a school dress code, the Sixth Circuit found that although parents "have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child."<sup>66</sup> While a dress code is arguably not the type of personal, moral instruction that parental rights advocates are currently objecting to, courts have not been more sympathetic to challenges to mandatory sex education programs and community service requirements on the grounds that they violate parents' rights to direct their children's upbringing and education.<sup>67</sup> The Constitution does not require schools to "cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter,"<sup>68</sup> including private and personal topics like sex. As the Second Circuit observed in a challenge to a school's health education curriculum, recognizing parents' fundamental right to tell a public school what (and what not) to teach their children would make it nearly impossible for administrators to develop a curriculum that is "responsive to the overall education needs of the community and its children."<sup>69</sup> An additional workability issue is that one parent's fundamental right would immediately run up against other parent's fundamental rights. Parents' rights, of course, do not extend to other children, but a

<sup>66</sup> *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005). Several circuits have quoted this language with approval: *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008); *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187 (1191) (9th Cir. 2006); *Skoros v. New York*, 437 F.3d 1, 41 (2d Cir. 2006).

<sup>67</sup> *See, e.g., Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525 (1st Cir. 1995) (upholding mandatory AIDS and sex education program at a public high school); *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D.C. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1970) (*per curiam*) (refusing to recognize parents' "exclusive constitutional right to teach their children about sexual matters in their own homes" and declining to strike down a state bylaw that provided for sex education); *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996) (holding that a community service requirement in the school curriculum did not infringe on parents' rights to control their children's education).

<sup>68</sup> *Brown*, 68 F.3d at 533.

<sup>69</sup> *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003).

parental right to exclude certain topics from a school curriculum affects their children's classmates' access to those programs and subjects, which, by extension, affects those parents' rights to control their children's education.

Courts have also refused to grant exemptions to particular portions of school curriculums under either a parental rights theory or a mixed First Amendment plus parental rights theory. Given the thin parental rights doctrine, most parents who seek to exempt their child from certain parts of the school curriculum do so under both the First and Fourteenth Amendments, which I address below. But Courts have also held that parents do not have a freestanding right under *Meyer* to exempt their children from a school's community service requirement or to pick and choose which classes their children will take in public school and which will be home-schooled.<sup>70</sup> *Yoder* itself held that "secular considerations" based on "philosophical and personal" beliefs were not given any weight against the state's interest in compulsory education to age sixteen.<sup>71</sup> In *Immediato v. Rye Neck School District*, parents of a high school student objected to the school's mandatory community service requirement because they felt that community service was a "matter of individual choice" and did not want the school's program to teach their son "that guidance on moral issues" came from the government, "rather than from within."<sup>72</sup> While noting that the parents objected to the program because it conflicted with their "morals" or "values" rather than its educational value, the Second Circuit found that difference lacked constitutional significance and upheld the program under rational basis review.<sup>73</sup> Current parents' rights supporters use

<sup>70</sup> See *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996) (refusing to exempt a student from his school's community service requirement on the basis his parents' rights to direct their child's upbringing); *Swanson by & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699-700 (10th Cir. 1998) (declining to recognize a parental right to send their children to school on a part-time basis and to choose which public school courses to attend).

<sup>71</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972).

<sup>72</sup> *Immediato*, 73 F.3d at 464.

<sup>73</sup> *Id.* at 461-62. Other circuits have also used the rational basis test to evaluate parental rights' claims: *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 178-80 (4th Cir. 1996); *Littlefield v. Forney*

similar language in opposing school lessons on “CRT,” sexual orientation, and gender identity as intruding on the character and value-building lessons they want to impart to their children. They claim such topics are “divisive” and “traumatizing” and have no place in the classroom.<sup>74</sup> Like the parents in *Immediato*, their objections stem from some non-religious, morals-based opposition to educators instructing their children about topics that the parents believe should be taught at home. But courts have not recognized those types of objections as sufficient grounds for a parent’s right to exempt their child from those aspects of the school curriculum.

Parents have also sought exemptions on behalf of their children on First Amendment grounds, both under *Wisconsin v. Yoder* and the *Smith* “hybrid rights” doctrine. It is hard to imagine that parents could use religious grounds to object to teaching children about racism, white privilege, or other related topics, but parents have long sought to exempt their children from sex education or discussions about sexual orientation and gender identity for religious reasons. These claims have failed under both *Yoder* and *Smith*.

Although *Yoder* was decided principally on First Amendment grounds, the Court cited *Pierce* and *Meyer* to explain that the state’s interest in universal education is not free from a balancing process when it implicates “the traditional interest of parents” in their children’s “religious upbringing.”<sup>75</sup> The Court carefully noted that compulsory education to age sixteen “carries with it a very real threat to undermining the Amish community and religious practice” and ran the risk of forcing the community to abandon their beliefs and “be assimilated into society at large.”<sup>76</sup> Clearly, *Yoder*’s facts were rather extreme, but parents nonetheless continued to invoke

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Indep. Sch. Dist., 268 F.3d 275, 290-91 (5th Cir. 2001); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 396 (6th Cir. 2005).

<sup>74</sup> See, e.g., Paige Williams, *The Right-Wing Mothers Fuelling the School-Board Wars*, NEW YORKER (Oct. 31, 2022), <https://www.newyorker.com/magazine/2022/11/07/the-right-wing-mothers-fuelling-the-school-board-wars>.

<sup>75</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (emphasis added).

<sup>76</sup> *Id.* at 218.

it as the basis for exempting their children from portions of the school curriculum. In *Mozert v. Hawkins County Board of Education*, parents objected to their children's reading assignments on religious grounds and sued the school district after the school board refused to allow the parents to exempt their children from the required reading.<sup>77</sup> The parents relied on *Yoder* in arguing that the school board unconstitutionally burdened their Free Exercise rights by requiring their children to be exposed to reading materials that offended their religious beliefs.<sup>78</sup> But the Sixth Circuit found that there was a dramatic difference between the two cases: the parents in *Yoder* faced an existential threat to their way of life, while the parents in *Mozert* "want[ed] [their children] to acquire all the skills required to live in modern society" but also wanted "to have them excused from exposure to some ideas they find offensive."<sup>79</sup> The Court held that home schooling or private schools were sufficient to accommodate the *Mozert* plaintiffs' objections. The First and Second Circuits have likewise refused to recognize *Yoder* as the basis for religious exemptions to school curriculums.<sup>80</sup> These precedents foreclose potential parents' rights claims to a First or Fourteenth Amendment right to exempt their children from certain aspects of the school curriculum. Although parents might claim that their "way of life" is threatened by a diverse and inclusive school curriculum (along either racial or sexual orientation and gender identity grounds), that assertion is easily distinguishable from *Yoder* and would not be backed by "almost 300 years of consistent

<sup>77</sup> *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1081 (6th Cir. 1987).

<sup>78</sup> *Id.* at 1067.

<sup>79</sup> *Id.*

<sup>80</sup> See *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003) ("[Plaintiff Leebaert] has not alleged that his community's entire way of life is threatened by Corky's participation in the mandatory health curriculum. Leebaert does not assert that there is an irreconcilable *Yoder*-like clash between the essence of Leebaert's religious culture and the mandatory health curriculum that he challenges."); *Parker v. Hurley*, 514 F.3d 87, 99 (1st Cir. 2008) ("While plaintiffs do invoke *Yoder*'s language that the state is threatening their very 'way of life,' they use this language to refer to the centrality of these beliefs to their faith, in contrast to its use in *Yoder* to refer to a distinct community and life style.").

practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life."<sup>81</sup>

Parents might also seek to exempt their children from parts of their school's curriculum under *Smith*'s hybrid rights doctrine. In *Employment Division v. Smith*, the Court suggested the possibility that a "hybrid situation" that combined a free exercise claim with another constitutional claim would receive a higher degree of scrutiny than rational basis.<sup>82</sup> Because the hybrid rights doctrine was not actually an issue in *Smith*, three circuits have held that the language is dicta and do not recognize hybrid rights claims, and two circuits have required the free exercise claim to be joined with an independently viable right.<sup>83</sup> As discussed above, plaintiffs' independent parental rights claims have failed, so the most likely option for a successful hybrid rights claim would be in circuits that apply a higher level of scrutiny for "colorable claims" combined with free exercise claims. But even those circuits have required something more than the "invocation of a general right such as the right to control the education of one's child."<sup>84</sup> The Tenth Circuit, for example, declined to recognize a colorable claim in *Swanson*, where the parents claimed the right to send their child to public school on a part-time basis. The court found no meaningful distinction between picking between "choosing one class your child will not attend [as in *Mozert*], and picking and choosing three, four, or five classes your child will not attend," neither of which was protected by

<sup>81</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972).

<sup>82</sup> *Emp't Div. v. Smith*, 494 U.S. 872, 882 (1990). This paper only offers a short discussion of the hybrid rights doctrine, as the doctrine's broader intricacies, as well as the weakening of *Smith*, are beyond the scope of this paper.

<sup>83</sup> The Second, Third, and Sixth Circuits have held that the language is dicta: *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 244 (3d Cir. 2008); *Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003); *Tract Soc'y of New York, Inc. v. Stratton*, 240 F.3d 553, 561-62 (6th Cir. 2001). The First and D.C. Circuits have required an independently viable right: *Gary S. v. Manchest Sch. Dist.*, 374 F.3d 15, 18-19 (1st Cir. 2004); *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001).

<sup>84</sup> *Swanson by & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998).

parental rights.<sup>85</sup> Even a favorable reading of the hybrid rights doctrine does not support a parent's right to exempt their child from parts of the school curriculum.

#### IV. CONCLUSION

Despite the current rhetoric around parental rights, there is very little legal authority to support it. Parental rights doctrine was already weak and was further eroded under *Dobbs*' narrow history and tradition test. *Pierce* and *Meyer* do not encompass a parents' right to control their children's public school curricula, nor do they provide a basis for requiring schools to offer an exemption from aspects of the curriculum that parents object to on moral or religious grounds.

The Court has never resolved the irony that *Pierce* and *Meyer* protect a traditional notion of the parent's role in their children's upbringing but also inaugurated a doctrine that vindicated non-traditional familial relationships through subsequent substantive due process cases. *Dobbs* has already shown that the current Court is willing to make bold legal changes and wade into heated political debates. While previous Courts have shied away from parents' rights, this Court might be interested in fortifying current parents' rights doctrine in light of its growing political influence. One potential avenue for this would be for the Court to clarify that a *Smith* hybrid claim only requires some minimal showing that another constitutional right, such as parental rights, is implicated to trigger strict scrutiny.<sup>86</sup> That could serve as a basis for eventually building out a robust parental rights doctrine that meets the political moment.

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<sup>85</sup> *Id.*

<sup>86</sup> The Court is currently considering whether to hear a *Masterpiece Cakeshop*-type case that asks the Court to clarify the *Smith* hybrid rights doctrine. Petition for Writ of Certiorari at 22-30, *Klein v. Or. Bur. Lab. Indus.*, No. 22-204 (Sept. 22, 2022).

**Applicant Details**

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 Last Name **Tahan**  
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**District of Columbia**  
**Zip**  
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**Country**  
**United States**

Contact Phone Number **7039999225**

**Applicant Education**

BA/BS From **University of Virginia**  
 Date of BA/BS **May 2019**  
 JD/LLB From **Georgetown University Law Center**  
[https://www.nalplawschools.org/employer\\_profile?FormID=961](https://www.nalplawschools.org/employer_profile?FormID=961)  
 Date of JD/LLB **May 21, 2023**  
 Class Rank **School does not rank**  
 Law Review/Journal **Yes**  
 Journal(s) **Georgetown Law Journal**  
 Moot Court Experience **No**

**Bar Admission****Prior Judicial Experience**

Judicial Internships/  
Externships      **Yes**  
Post-graduate Judicial  
Law Clerk      **No**

### **Specialized Work Experience**

### **Recommenders**

Pasachoff, Eloise  
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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Darya Tahan  
440 K St. NW, Apt. 1313  
Washington, D.C. 20001

June 12, 2023

The Honorable Judge Kiyo Matsumoto  
225 Cadman Plaza East  
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am a recent graduate of Georgetown University Law Center and the former Senior Administrative Editor of *The Georgetown Law Journal*. In the fall, I will be joining Latham & Watkins in New York as a litigation associate. I am writing to apply for a 2025-2026 clerkship in your chambers. As the daughter of immigrants from the Middle East and a fellow Georgetown Law graduate, it would be an honor to join your chambers.

As a practiced legal researcher and writer with a wide breadth of legal experience, I believe I would make a valuable addition to your chambers. Each position I have held—from my non-profit experience, to serving as a law clerk for an Administrative Law Judge, to working at a law firm, to interning for a federal magistrate judge—has allowed me to develop the skills integral to being an effective litigator and a judicial clerk. In particular, my experiences serving as a judicial intern at both an administrative agency and at a federal court have solidified my desire to clerk. As a law clerk to an Administrative Judge, I had the opportunity to draft summary judgment orders, evaluate the merits of employment discrimination claims, and independently lead discovery disputes. Moreover, I greatly enjoyed my experience interning for U.S. Magistrate Judge Zia Faruqui. In the role, I had the opportunity to write bench memoranda, draft judicial opinions, and conduct cite checks on a wide range of legal issues. In addition to my work experience, my academic pursuits have also shaped me into an effective legal writer. Building upon the writing experience I honed while obtaining a Master's in English, at Georgetown Law I was selected to serve as a Legal Research & Writing Law Fellow during my 2L year. As a first-generation lawyer and an aspiring litigator, serving as a judicial clerk will not only allow me to continue to develop the skills necessary to be an effective advocate, but it will also allow me to participate in the administration of justice at the federal level.

I am eager to apply my skills to support your chambers. My resume, law school transcript, undergraduate and graduate transcript, and writing sample are submitted with this application. Additionally, letters of recommendation from Professors Eloise Pasachoff, Jessica Wherry, and Mary McCord & Kelsi Corkran are also included. Please let me know if I can provide any additional information. I can be reached by email at [dt515@georgetown.edu](mailto:dt515@georgetown.edu) or by phone at (703) 999-9225. Thank you very much for considering my application.

Respectfully,



**DARYA TAHAN**

440 K St. NW, Apt. 1313, Washington, D.C. 20001 • (703) 999-9225 • dt515@georgetown.edu

**EDUCATION****GEORGETOWN UNIVERSITY LAW CENTER****Washington, DC***Juris Doctor*

Expected May 2023

GPA: 3.77

Journal: *The Georgetown Law Journal*, Senior Administrative Editor

Honors: Dean's List; Legal Research &amp; Writing Law Fellow (Aug. 2021–May 2022)

Activities: Women of Color Collective (Mentor); Public Interest Law Fellow

**UNIVERSITY OF VIRGINIA****Charlottesville, VA**

Master of Arts in English

May 2020

Bachelor of Arts with Distinction in Political Philosophy, Policy, &amp; Law and English

May 2019

GPA: 3.80

Honors: Dean's List; Intermediate Honors; Phi Sigma Alpha National Politics Honor Society

Activities: Student Council; *The Cavalier Daily*; Phi Sigma Pi Honor Fraternity; the Institute of World LanguagesThesis: *Checking the Box: Examining the Recognition, Representation, and Identity of People of Middle Eastern and North African Descent in the United States*

Research: Graduate Research Assistant (2020); Undergraduate Research Assistant (2017–2019)

**EXPERIENCE****LATHAM & WATKINS****New York, NY***Litigation Associate*

Upcoming Fall 2023

*Summer Associate*

May–Aug. 2022

- Wrote research memoranda on various legal topics, including legal malpractice, environmental law, and criminal law
- Co-led a pro bono project representing a family in their immigration process by preparing documents and conducting client interviews

**INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION****Washington, DC***Practicum Student, Georgetown Law*

Jan. 2023–May 2023

- Produced research memoranda for various litigation and advocacy projects, including immigration matters and the power of sheriffs

**U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA****Washington, DC***Judicial Intern, Magistrate Judge Zia M. Faruqi*

Aug. 2022–Nov. 2022

- Drafted judicial opinions, composed bench memoranda, and conducted cite checks on a wide range of issues, including a Social Security benefits appeal and an immigration matter, for Judge Faruqi's chambers

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION****Washington, DC***Law Clerk, Administrative Judge Cynthia McKnight*

Aug. 2021–Dec. 2021

- Drafted orders granting summary judgment, evaluated employment discrimination claims, conducted discovery meetings with parties, and attended hearings to assist with Administrative Judge McKnight's docket

**GEORGETOWN UNIVERSITY LAW CENTER****Washington, DC***Legal Research Assistant, Professor Irving Gornstein*

Jun. 2021–Aug. 2021

- Prepared summaries of Supreme Court cases set for review, to be published by the Supreme Court Institute

**THE CENTER FOR POPULAR DEMOCRACY****Brooklyn, NY***Legal Intern, Worker Justice*

Jun. 2021–Aug. 2021

- Conducted legal research on expanding unemployment insurance, establishing a federal paid family leave program, and other labor & employment matters

**FAIRFAX COUNTY GOVERNMENT****Fairfax, VA***Public Information Officer's Intern, Land Development Services*

Jun. 2019–Aug. 2019

- Established a communication plan on social and racial equity as a part of the One Fairfax Initiative

**LANGUAGES, SKILLS, & INTERESTS**

- Intermediate Farsi
- Photography, artisan bagel making, reading, *Jeopardy!*, and piano

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Darya Tahan  
GUID: 803722009

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center  
Juris Doctor  
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	42	Civil Procedure Maria Glover	4.00	A	16.00	
LAWJ	002	43	Contracts Donald Langevoort	4.00	A	16.00	
LAWJ	004	42	Constitutional Law I: The Federal System	3.00	A-	11.01	
LAWJ	005	41	Legal Practice: Writing and Analysis Yvonne Tew Jessica Wherry	2.00	IP	0.00	
				EHrs	QHrs	QPts	GPA
Current				11.00	11.00	43.01	3.91
Cumulative				11.00	11.00	43.01	3.91
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	003	41	Criminal Justice Irving Gornstein	4.00	B+	13.32	
LAWJ	005	41	Legal Practice: Writing and Analysis Jessica Wherry	4.00	A	16.00	
LAWJ	007	41	Property K-Sue Park	4.00	A	16.00	
LAWJ	008	94	Torts John Hasnas	4.00	A-	14.68	
LAWJ	025	50	Administrative Law Eloise Pasachoff	3.00	A-	11.01	
Dean's List 2020-2021							
				EHrs	QHrs	QPts	GPA
Current				19.00	19.00	71.01	3.74
Annual				30.00	30.00	114.02	3.80
Cumulative				30.00	30.00	114.02	3.80
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	1491	10	Externship I Seminar (J.D. Externship Program)		NG		
LAWJ	1491	92	~Seminar Sunita Iyer	1.00	A-	3.67	
LAWJ	1491	94	~Fieldwork 3cr Sunita Iyer	3.00	P	0.00	
LAWJ	165	05	Evidence Michael Gottesman	4.00	A-	14.68	
LAWJ	215	08	Constitutional Law II: Individual Rights and Liberties	4.00	A	16.00	
LAWJ	536	13	Legal Writing Seminar: Theory and Practice for Law Fellows Louis Seidman Jessica Wherry	3.00	A	12.00	
				EHrs	QHrs	QPts	GPA
Current				15.00	12.00	46.35	3.86
Cumulative				45.00	42.00	160.37	3.82

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Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	038	08	Antitrust Law: A Survey from the Sherman Act of 1890 to Today's Progressive Movement Howard Shelanski	3.00	B+	9.99	
LAWJ	331	05	Nationalisms, States, & Cultural Identities Seminar Naomi Mezey	3.00	A	12.00	
LAWJ	455	01	Federal White Collar Crime Julie O'Sullivan	4.00	A-	14.68	
LAWJ	536	13	Legal Writing Seminar: Theory and Practice for Law Fellows Sherri Lee Keene	3.00	A	12.00	
Dean's List 2021-2022							
				EHrs	QHrs	QPts	GPA
Current				13.00	13.00	48.67	3.74
Annual				28.00	25.00	95.02	3.80
Cumulative				58.00	55.00	209.04	3.80
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	121	09	Corporations Donald Langevoort	4.00	B+	13.32	
LAWJ	1461	05	Race and Poverty in Capital and Other Criminal Cases Seminar Stephen Bright	3.00	A-	11.01	
LAWJ	1492	07	Externship II Seminar (J.D. Externship Program)		NG		
LAWJ	1492	122	~Seminar Rachit Choksi	1.00	A-	3.67	
LAWJ	1492	124	~Fieldwork 3cr Rachit Choksi	3.00	P	0.00	
LAWJ	361	03	Professional Responsibility Stuart Teicher	2.00	A-	7.34	
In Progress:							
				EHrs	QHrs	QPts	GPA
Current				13.00	10.00	35.34	3.53
Cumulative				71.00	65.00	244.38	3.76
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	036	09	Advanced Legal Writing and Practice for Judicial Clerks and Civil Litigators	2.00	A+	8.66	
LAWJ	1518	05	Doing Justice: Trial Judges Explain How Tough Decisions Are Made	2.00	A	8.00	
LAWJ	1601	01	Constitutional Impact Litigation Practicum (Project-Based Practicum)	5.00	A-	18.35	
LAWJ	1611	09	Administrative Law and Public Administration Seminar	2.00	A-	7.34	
LAWJ	178	05	Federal Courts and the Federal System	3.00	A-	11.01	

-----Continued on Next Page-----

This is not an official transcript. Courses which are in progress may also be included on this transcript.

**Record of:** Darya Tahan  
**GUID:** 803722009

----- Transcript Totals -----				
	EHrs	QHrs	QPts	GPA
Current	14.00	14.00	53.36	3.81
Annual	27.00	24.00	88.70	3.70
Cumulative	85.00	79.00	297.74	3.77
----- End of Juris Doctor Record -----				

Unofficial

Georgetown Law  
600 New Jersey Avenue, NW  
Washington, DC 20001

June 11, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am pleased to write this letter of recommendation for **Darya Tahan, Georgetown Law JD '23, University of Virginia MA '20 and BA '19**, who has applied to you for a clerkship.

Darya has done very strong work in both classes she took with me: Administrative Law, during her 1L year, and a seminar called Administrative Law and Public Administration, during her 3L year, in both of which she earned an A-.

I did not get to know Darya as well as I would have liked to during her 1L year, in part because the class was so large (75 students), in part because it was fully on Zoom due to the pandemic, and in part because she is a comparatively quiet student. But I really enjoyed getting to know her better during the seminar, when she was only one of 18 students. She wrote a very good paper on the military's use of contractors during the war in Afghanistan, teasing apart legal issues, accountability issues, and immigration issues very well. Her research was wonderful and her writing was clear and well organized. We had several one-on-one conferences about her developing paper ideas, and I admire the way she came prepared with specific questions but was also open to more general feedback, which she then beautifully implemented in the next iteration of the project. The skills she exhibited during this process indicate to me that she will be a very good law clerk.

Her other experiences in law school underscore that promise, including internships for a magistrate judge in federal court in the District of Columbia and an administrative judge at the EEOC. She also developed skills in writing bench memos as a Law Fellow and in a separate course on Advanced Legal Writing. She would also come to you with litigation experience from her time as an associate at Latham & Watkins, where she will begin her career after taking the bar, and before that as a practicum student in Georgetown's Institute for Constitutional Advocacy and Protection. She also honed her skills in writing during her time as a senior editor on the Georgetown Law Journal and as a master's student in English before coming to law school. She is also a nice, thoughtful, and easygoing person, dedicated to mentoring those around her.

For all of these reasons, I think she will be a strong law clerk, and I am glad to support her application. Please don't hesitate to reach out if a conversation would be useful.

Very truly yours,

Eloise Pasachoff  
Agnes Williams Sesquicentennial Professor of Law

Eloise Pasachoff - [eloise.pasachoff@law.georgetown.edu](mailto:eloise.pasachoff@law.georgetown.edu) - 202-661-6618

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**Institute for Constitutional Advocacy and Protection**  
600 New Jersey Avenue, NW  
Washington, DC 20002

June 11, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

We write to express our enthusiastic support for Darya Tahan's application to serve as a law clerk in your chambers. Darya's performance in the Constitutional Impact Litigation Practicum-Seminar that we co-taught in the spring of 2023 was terrific. Her exceptional research skills, clear and thoughtful writing style, and collegiality would hold her in good stead in any judge's chambers.

The Practicum-Seminar is a 5-credit course that involves law students in the work of the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown Law. ICAP is a public interest law practice within the law school that pursues constitutional impact litigation in courts across the country. Darya was an important member of our team over the course of the semester, contributing valuable research support and legal analysis on a wide range of matters. Among other assignments,

Darya developed and drafted a section of our brief opposing certiorari in a case involving the Fair Labor Standards Act; she researched and analyzed a complex immigration statute in preparation for opposing a petition for rehearing en banc; she drafted a memo analyzing sex-discrimination precedent across the circuits; and she prepared public education materials regarding the so-called "constitutional sheriffs" movement.

Darya not only produced excellent work on each matter to which she was assigned, but she did so in a professional and efficient manner that will serve her well as a law clerk. She was enthusiastic, communicative, and remarkably adept at revising her already terrific drafts in response to our suggestions. One assignment in particular involved an incredibly complicated area of law that would have been intimidating for any young lawyer, let alone a law student, but Darya did not hesitate to dive in and find the answers we needed. Her willingness to take on challenges and her ability to work well across a range of substantive areas will make her a valuable asset in chambers.

In addition to her significant contributions to ICAP's work, Darya was a thoughtful contributor to our weekly seminar. The seminar covers topics such as threshold barriers to constitutional litigation (standing, abstention, etc.), legal theories under different constitutional provisions (due process, equal protection, First Amendment, etc.), and strategic considerations in impact litigation, among other things. Darya's contributions in our weekly discussions revealed her eagerness to learn and her commitment to pursuing justice in her legal practice.

Together we have clerked at all three levels of the federal judiciary and, based on that experience, we believe that Darya would be a welcome addition to any judge's chambers. We would be happy to answer any further questions that you might have, and appreciate your consideration of Darya's application.

Respectfully submitted,

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The Honorable Kiyo Matsumoto  
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Dear Judge Matsumoto:

I write to recommend wholeheartedly Darya Tahan for a clerkship in your chambers. My first experience with Darya was during the 2020-2021 academic year when she was a student in my first-year Legal Practice: Writing & Analysis course at Georgetown Law. Having Darya as a first-year student was a bright spot in a challenging year teaching on Zoom. During the 2021-2022 academic year, Darya was one of my upper-level Law Fellows responsible for assisting me in teaching the Legal Practice course, as well as my student in an upper-level writing seminar related to her role as a Law Fellow. Most recently, Darya volunteered several hours on a Saturday morning in March to serve as a judge for my first-year students' oral arguments. It was delightful to see her, and my students had positive feedback about her questions and comments during the arguments.

Darya's academic strengths are exceptional, with an overall 3.76 GPA. From the very start of the fall semester as a first-year law student, Darya demonstrated a commitment to developing her legal research and writing skills. She came to law school after completing a Master's degree in English; even with her depth of writing experience, she found the transition to legal writing challenging. Darya rose to the challenge, and I think she thrived in pushing herself to understand and master legal writing. In the fall semester, Darya scored a hypothetical A- on the take-home memo exam (hypothetical because no actual grades are assigned until the completion of both semesters). Her high-quality memo demonstrated her understanding of how to analyze a legal issue and communicate legal analysis to meet a supervisor's expectations. This take-home exam required Darya to perform independent legal research and writing to produce a memorandum to a fictional supervisor analyzing a state law question. Darya also wrote a strong brief in the spring exam, the third highest score out of the class of 50 students and a hypothetical A grade, earning an overall A in the course.

As a Law Fellow, Darya consistently exceeded my expectations. Law Fellows are upper-level students selected from a highly selective pool of applicants to work closely with a professor in providing written feedback on student work product, conferencing with students, and otherwise supporting a professor's teaching. In my years of working with teaching assistants, I have come to realize the importance of selecting students that I will consistently want to work with, including under stressful circumstances. Darya was an ideal Law Fellow; she was diligent, pleasant, hardworking, timely, and responsive to my feedback. She participated fully in every aspect of the Law Fellow role, including drafting comments, holding conferences, supporting students in our in-class writing labs, and providing extra office hours before students' writing deadlines.

Darya worked tirelessly to encourage and guide our students toward success, however they defined that. Darya consistently met deadlines and her work required few substantive edits from me. She was also responsive to students' requests for additional office hours and conferences; she prioritized students' needs to ensure they knew she was a resource to them. Darya was exceptionally skilled at incorporating my feedback on her written comments on students' papers. Typically, I had some substantive comments for her in the first few papers and the latter half of her set of comments would require very little work on my end. She was able to adapt my feedback on one student's paper to another student's paper, demonstrating a high-level understanding of my comments and an ability to develop her approach throughout the process. Darya was also a reliable team player and natural leader. She worked well in my group of Law Fellows, contributing to group projects, treating colleagues respectfully, and maintaining a positive attitude. She consistently supported and amplified others' voices.

Darya is exceptionally reflective and always working to improve her understanding and skills. She has a demonstrated commitment to and interest in legal practice and clerking in particular. Darya would bring a range of experience to your chambers, including working as a law clerk to Administrative Judge Cynthia McKnight, United States Equal Employment Opportunity Commission; serving as a legal intern for Magistrate Judge Zia Faruqui, United States District Court for the District of Columbia; and writing bench memos in her upper-level course work. These experiences have led Darya to seek a clerkship in your chambers as she hopes to continue learning and developing her own oral and written communication skills. She is also committed to contributing to the court's purpose in serving justice in her role as your clerk.

For all of these reasons, I am certain you would find Darya a welcome addition to your chambers. Darya's strengths as a person, a thinker, a writer, and a future lawyer are incomparable. Her academic record is extraordinary, and I expect her legal career to be just as notable and productive. She would bring her practitioner-quality writing skills to your chambers with a sincere desire to continue learning and further strengthening those skills. Please do not hesitate to contact me if there is any additional information I can provide. I can be reached at 443-889-6140 (cellphone) or [jessica.wherry@law.georgetown.edu](mailto:jessica.wherry@law.georgetown.edu).

Very best wishes,

Jessica Lynn Wherry  
Professor of Law, Legal Practice

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**WRITING SAMPLE**

The following writing sample is a portion of a Motion to Dismiss that I wrote for my Spring 2023 Advanced Legal Writing and Practice for Judicial Clerks and Civil Litigators seminar. For this assignment, I was instructed to represent two police officers who were each facing a claim that they used excessive force during an arrest. I was directed by my professors to not address the issue of qualified immunity; rather, the analysis focuses on the *Graham* factors. This version is my independent work, but was revised slightly based on feedback from my professors.

To reduce the length of this sample, I have omitted the Introduction, Background, Legal Standard, and Conclusion. I have also omitted the Table of Contents, the Table of Authorities, the Request for Oral Hearing, the Certificate of Service, and the Certificate of Compliance. The following facts are relevant to the argument. The plaintiff, Cory Smith (“Smith”), is a 21-year-old college student who engaged in a night of partying on Looney Street (a fictional street in Washington, D.C.) with her friends while possessing a large super soaker squirt gun. While patrolling the busy area, Officers Johnson and Murphy (collectively, “Officers”) witnessed an altercation involving Smith in which she hit students with the squirt gun, causing one student to exclaim in pain and another to tell Smith to stop; Smith then fled from the scene. The Officers pursued Smith and utilized takedown maneuvers to arrest her.

[Sections omitted.]

### ARGUMENT

Individuals may bring a claim in federal court under 42 U.S.C. § 1983 on the ground that an officer used excessive force during an arrest in violation of the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 395 (1989); 42 U.S.C. § 1983. The Supreme Court has established that “all claims that law enforcement officers have used excessive force—deadly or not— . . . should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.” *Graham*, 490 U.S. at 395; *see* U.S. Const. amend. IV. The process of “[d]etermining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.” *Id.* at 396 (citation omitted). Notably, “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” infringes on an individual’s Fourth Amendment rights. *Id.* (internal citation omitted). Rather, “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Id.* at 396–97. The inquiry as to the reasonableness of the use of force “is objective; the subjective intent of the officer . . . is irrelevant.” *Wasserman v. Rodacker*, 557 F.3d 635, 641 (D.C. Cir. 2009).

The use of force by Officers Johnson and Murphy was reasonable under the circumstances. Although Smith’s offense was relatively minor, the Officers’ use of force was reasonable because of Smith’s active resistance to the arrest and the immediate threat Smith posed to the Officers and others. Moreover, the Officers’ use of force was reasonable because

they used standard takedown maneuvers to subdue the threat posed by Smith and stopped once she was handcuffed. Finally, even though Smith sustained some injuries, the Officers' use of force was still reasonable because the presence of injuries is not a dispositive factor in the excessive force inquiry.

**I. The Officers acted reasonably in response to Smith's active resistance to the arrest and the immediate threat she posed, despite the relatively unserious nature of Smith's crime.**

For excessive force claims, the "proper application" of the Fourth Amendment's reasonableness standard "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [s]he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 395. Here, Officers Johnson and Murphy used a reasonable amount of force in response to Smith's active resistance to the arrest and the immediate threat she posed to herself, the Officers, and others, even though Smith's alleged crime was relatively unserious.

**A. The Active Resistance to the Arrest**

One of the three *Graham* factors to consider is whether a suspect actively resisted arrest. *Id.* It is reasonable for officers to resort to force when a suspect actively resists arrest, which includes fleeing and not complying with officer demands. *See, e.g., Wasserman*, 557 F.3d at 641 (the use of force was reasonable when the plaintiff did not heed the officer's demand to stop walking); *Oberwetter*, 639 F.3d at 555 (the use of force was reasonable in part because the plaintiff refused the officer's order to stop dancing and leave area).

In *Wasserman v. Rodacker*, the plaintiff violated a law criminalizing walking a dog without a leash and refused to comply with an officer's demands. *See* 557 F.3d at 641. When the officer noticed Wasserman walking his dogs without a leash, she started following him and

“ordered him to stop and answer some questions.” *Id.* at 636. However, rather than stopping, Wasserman “responded that he did not have to answer and continued walking.” *Id.* In response to Wasserman’s noncompliance, the officer “forcefully pressed upwards on Wasserman’s arm before handcuffing him” even though Wasserman “was not moving or offering any resistance” at the time of the arrest. *Id.* at 641. The court determined that “it was reasonable for [the officer] to apply force to Wasserman’s arm to secure his compliance during arrest” because “[p]olice officers have authority to use ‘some degree of physical coercion’ when arresting a suspect . . . and Wasserman’s refusal to obey [the officer’s] order [to stop walking] prior to his arrest suggested that he might try to resist or escape.” *Id.* (quoting *Graham*, 490 U.S. at 396).

Here, Smith ran away from the scene, refused to stop when Officer Johnson ordered her to, and refused to drop the squirt gun despite the Officers asking her to do so multiple times. Compl. ¶¶ 43–44, 47, 50, 56–58. Therefore, Smith’s “refusal to obey [Officers’] order prior to h[er] arrest suggested that [s]he might try to resist or escape.” *Wasserman*, 557 F.3d at 641. Additionally, Smith running away from the scene suggested that she might try to “escape” even more so than the plaintiff in *Wasserman* who simply was “walking away quickly.” *Id.* at 636. As such, like in *Wasserman*, the Officers had “authority to use ‘some degree of physical coercion’” when arresting Smith because her noncompliance increased the fear that she might attempt to escape arrest. *Id.* at 641.

Furthermore, unlike “Wasserman [who] was not offering any resistance” and was standing still as the officer “forced Wasserman’s arm behind his back” before handcuffing him, Smith admits that she did offer resistance. *Id.* at 409, 414. The Complaint notes that when Smith finally stopped running, she still “took two steps backwards” as Officer Johnson tried to apprehend her. Compl. ¶ 58. Moreover, she continued to hold the squirt gun, even after repeated

requests to drop it. *Id.* Furthermore, Smith also resisted Officer Murphy by “reflexively tr[ying] to pull her arm away” as Officer Murphy attempted to get Smith to drop the squirt gun. *Id.* ¶ 62. As the *Wasserman* court noted, “[p]olice officers have authority to use ‘some degree of physical coercion’ when arresting a suspect,” especially when a suspect refuses to comply with an officer’s demands, resists arrest, or tries to escape. *Wasserman*, 557 F.3d at 414 (quoting *Graham*, 490 U.S. at 396). Here, Smith appeared to be escaping when she ran from the scene and resisted arrest on multiple occasions by refusing to comply with the Officers’ demands, thereby justifying the Officers’ use of force.

### **B. The Immediate Threat Posed by Smith**

Since Smith posed an immediate threat to herself, the Officers, and others, the Officers used a reasonable amount of force. The second *Graham* factor considers whether the suspect poses an immediate threat to the safety of the officers or others. *See Graham*, 490 U.S. at 395. As this court asserted in *Lash v. Lemke*, “[t]here is always a potential threat to officers when they are . . . close to an individual who they are trying to arrest, because the individual may try to grab one of the officer’s weapons or actually hit an officer trying to arrest him.” 971 F. Supp. 2d 85, 96 (D.D.C. 2013), *aff’d on other grounds* 786 F.3d 1 (D.C. Cir. 2015). As such, officers are “forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary.” *Graham*, 490 U.S. at 396–97.

In *Oberwetter v. Hilliard*, the plaintiff was arrested for dancing inside the Jefferson Memorial. *See* 639 F.3d 545, 548 (D.C. Cir. 2011). The court found that an arresting officer did not use excessive force against the dancing woman when he “violently twist[ed]” her arm during the arrest in part because she “was accompanied by a group of 17 other people at the time,” which could “have caused [the officer] to be reasonably worried that events might get out of

hand.” 639 F.3d at 548, 555. The court went on to note that the potential threat posed by the situation was especially apparent “given the lateness of the hour and the unusual activity of the crowd, whose intentions [the officer] did not know,” further justifying the officer’s decision to “take decisive action to subdue [the plaintiff] quickly and forcefully, thereby reducing the risk of interference or escape.” *Id.* at 555.

Here, similar circumstances are present that justify the Officers’ use of force. In *Oberwetter*, the court found the use of force in the arrest reasonable due to the fact that the plaintiff was accompanied by 17 other individuals and there was a reasonable fear that events may get out of hand during the arrest. *See id.* Likewise, here, Smith was not alone during the arrest. She was accompanied by Garcia, who also fled from the scene and wielded a squirt gun. Compl. ¶¶ 43, 66. While Smith only had one collaborator, unlike the 17 individuals present in *Oberwetter*, like in *Oberwetter*, there were many students in the Looney Street area partying and “the lateness of the hour and the unusual activity” of Smith and Garcia further added to the reasonableness of the Officers’ actions because the events took place around midnight in a moderately lit alley. *Oberwetter*. 639 F.3d at 555; *see* Compl. ¶¶ 17, 33. Therefore, as in *Oberwetter*, these factors created an environment where events may easily get out of hand and justified the Officers’ use of force when arresting Smith. *See Oberwetter*. 639 F.3d at 555.

In *Lin v. District of Columbia*, an officer used force to arrest a suspect who was not “offering any resistance” but nonetheless posed a threat. 47 F.4th 828, 846 (D.C. Cir. 2022). The court held that the use of force was reasonable because “[t]he severity of the security problem was elevated in part because the officers had probable cause to believe that [the plaintiff] had just physically assaulted” an individual, as evidenced by a scratch on the individual’s face. *Id.* at 847.

Therefore, the court found that the officers used a reasonable amount of force in effectuating the plaintiff's arrest. *Id.*

Similarly, in *Hedgpeth v. Rahim*, an officer used force to arrest a visibly intoxicated suspect who they had reason to believe had committed an assault. *See* 893 F.3d 802, 807 (D.C. Cir. 2018). The court found that “the officers could have reasonably believed [the plaintiff] presented a danger to himself, the officers, or someone else he might have encountered that night” because he “was visibly intoxicated and uncooperative, and there is no genuine dispute that the officers were at least under the impression that he had just been hitting people on a busy sidewalk.” *Id.* Moreover, as the plaintiff’s “behavior began to attract a crowd, the officers had reasonable grounds to conclude that [he] presented a risk to himself and others.” *Id.*

Here, although playing with squirt guns is not necessarily an “unusual activity” that would be seen as threatening, Officers Johnson and Murphy had reason to believe that a visibly intoxicated Smith had committed an assault. *Oberwetter*, 639 F.3d at 555. The Officers heard one student exclaim in pain in response to Smith shooting them in the head and heard another student tell Smith to “[c]ut it out!” before Smith and Garcia ran away. Compl. ¶¶ 41, 43. Smith’s actions here were arguably an assault, which elevated “[t]he severity of the security problem” and further justified the Officers’ decision to use reasonable force to arrest her because they had reason to believe she posed a threat to themselves and others. *Lin*, 47 F.4th at 847. The threat posed by Smith was further heightened because, like the plaintiff in *Hedgpeth*, she was visibly intoxicated. *See Hedgpeth*, 893 F.3d at 802. During the night of partying, Smith stumbled and bumped into Officer Murphy earlier in the night, the Officers heard Smith tell her classmate “come get turnt,” the Officers saw Smith stumble again later in the night as she fired her squirt gun, and Smith repeatedly refused to comply with the Officers’ demands. Compl. ¶¶ 29, 41, 43–

44, 56–58. Therefore, like in *Hedgpeth*, the Officers “could have reasonably believed [Smith] presented a danger to [herself], the officers, or someone else he might have encountered that night” because she “was visibly intoxicated and uncooperative, and there is no genuine dispute that the officers were at least under the impression that [s]he had just been hitting people.”

*Hedgpeth*, 893 F.3d at 807. Additionally, like in *Hedgpeth* where the presence of a crowd further justified the officers’ belief that the plaintiff posed a threat, here the altercation with Smith took place in a busy area where crowds of college students were celebrating and further supported the Officers’ reasonable belief that Smith posed a threat. *Id.*

Therefore, taking these circumstances in conjunction, the Officers had reason to believe that Smith posed an immediate threat to the safety of herself, the Officers, and others in the area. The severity of the threat was heightened because there was reason to believe that Smith had assaulted a student, Smith was visibly intoxicated, there were many college students celebrating in the area, thefts and robberies occur in the area multiple times a semester, and the Officers had to control both Smith and Garcia in a rapidly evolving situation.

Additionally, unlike in *Hall*, where the plaintiff did not pose “any threat to [the officer] or others” because the plaintiff did not resist arrest or have a weapon, here, the reasonable belief that Smith posed an immediate threat to the safety of the Officers or others is present. *Hall v. District of Columbia*, 867 F.3d 138, 157 (D.C. Cir. 2017). Like the court noted in *Lash*, “a reasonable officer could have believed that [Smith] posed an immediate threat to the safety of the officers or others” because “[s]he was in close physical proximity to the officers and their weapons.” *Lash*, 971 F. Supp. 2d at 96. During the course of the arrest, Smith and the Officers were in a narrow alley, Officer Johnson was holding Smith down with his knee, and Officer Murphy held Smith’s arm; these facts demonstrate the closeness of Smith to the Officers and

their weapons. Compl. ¶¶ 14, 61, 62. The reasonable belief that Smith posed a threat is further compounded by the fact that Smith wielded a large squirt gun and refused to drop it even after the Officers repeatedly asked her to. *Id.* ¶¶ 50, 56, 58. The close physical proximity and the large squirt gun, along with Smith’s continuous noncompliance, as established in section I.A., *supra*, could reasonably lead the Officers to believe that Smith posed an immediate threat. Therefore, the Officers used a reasonable amount of force “in circumstances that [were] tense, uncertain, and rapidly evolving,” *Graham*, 490 U.S. at 396–97, in order to protect themselves and others before things “g[o]t out of hand.” *Oberwetter*, 639 F.3d at 555.

### C. The Severity of the Crime

The final *Graham* factor considers the severity of the crime at stake. In general, less serious crimes are seen to warrant less force in comparison to more serious infractions. *See Hall*, 867 F.3d at 157 (holding that the officer’s use of force was unwarranted in part because there was “no indication” that the plaintiff “had committed a serious crime”). However, the D.C. Circuit has repeatedly held that officers reasonably resorted to force during an arrest for nonviolent crimes and misdemeanors. *See, e.g., Oberwetter*, 639 F.3d at 548 (holding that the use of force was reasonable when the officer “quickly and forcefully” arrested plaintiff silently dancing at a national monument); *Wasserman*, 557 F.3d at 641 (holding that the use of force was reasonable when officer forcefully handcuffed an individual violating a dog leash law). In particular, courts have found that the use of force during the course of an arrest for nonviolent crimes and misdemeanors is reasonable when the suspect resists arrest and poses a threat. *See, e.g., Oberwetter*, 639 F.3d at 555 (holding that the use of force was reasonable because the plaintiff “twice refused [the officer’s] order to stop”). Therefore, the lack of severity of the crime is not dispositive in the excessive force inquiry and must be weighed alongside the other two

factors. After all, “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers violates the Fourth Amendment.” *Graham*, 490 U.S. at 396 (cleaned up).

In *Lash v. Lemke*, the plaintiff was participating in a protest “where protesters had set up . . . makeshift shelters.” 971 F. Supp. 2d at 88. When officers placed notices on these makeshift shelters to demonstrate that the government intended to enforce its no-camping regulations, the plaintiff swore at the officers and removed the notices. *Id.* The officers attempted to arrest the plaintiff; when he resisted arrest, an officer deployed a taser on the plaintiff. *Id.* at 90. The court found that “although [the plaintiff’s] crime was nonviolent, the officers were in a hostile environment where protesters were yelling at and following the officers while the officers attempted” their arrest. *Id.* at 95. Moreover, “the many tents in the area made it more difficult for the police to know exactly how many individuals were present and where they were located.” *Id.* Also, the plaintiff “actively resisted arrest” by “pull[ing] his arms away from the officers when they tried to handcuff him.” *Id.* Therefore, the court held that the officers’ use of force was reasonable since the immediate threat to the safety of the officers posed by the plaintiff and his active resistance to arrest outweighed the nonviolent nature of the crime. *Id.*

Similarly, in *Wasserman*, the crime at issue was a violation of a dog leash law. *Wasserman*, 557 F.3d at 641. Nevertheless, despite the lack of severity of the crime, the court determined that “it was reasonable for [the officer] to apply force to [the plaintiff’s] arm to secure his compliance during arrest” because the plaintiff had previously refused to obey the officer’s orders. *Id.* Therefore, the severity of the crime was outweighed by the threat posed by the plaintiff’s noncompliance and justified the use of force. *See id.*

Here, the Officers’ use of force was reasonable despite the fact that the crime of public intoxication is generally a nonviolent misdemeanor because of the presence of a crowd, Smith’s

resistance to the arrest, and the immediate threat Smith posed. In *Lash*, the crime was nonviolent but the presence of yelling protesters created a hostile environment justifying the use of force, especially because officers could not tell exactly how many individuals were present and where they were located. *See Lash*, 971 F. Supp. 2d at 95. Similarly, here, while Smith’s crime of public intoxication is nonviolent, the large number of partygoers in the area and the inability of the Officers to know exactly where they were located justified their use of force to quickly restrain Smith before the situation got out of hand. Compl. 17. Additionally, like in *Lash*, where the use of force was reasonable despite the lack of severity of the crime because the plaintiff actively resisted arrest by pulling his arm away from the officer, Smith also “reflexively tr[ie]d to pull her arm away” from Officer Murphy. Compl. ¶ 62; *see Lash*, 971 F. Supp. 2d at 95. Moreover, like *Wasserman*, where the use of force was reasonable despite the nonserious nature of the crime because the plaintiff was noncompliant, Smith repeatedly disregarded the Officers’ orders when she did not stop running and when she did not drop the squirt gun. *See Wasserman*, 557 F.3d at 641. Therefore, the Officers’ use of force was reasonable despite the lack of severity of Smith’s crime because of the crowded nature of the environment, Smith’s active resistance to the arrest, and Smith’s noncompliance.

**II. The Officers used standard takedown maneuvers in the face of a threat, which does not constitute excessive force.**

Moreover, the Officers’ use of force was reasonable because Officer Johnson used a standard takedown maneuver in the face of a threat and Officer Murphy used only as much force as necessary to neutralize the threat posed by Smith not relinquishing her squirt gun. Leg sweeps, applying pressure to a suspect’s arms, pressing a suspect into a wall, and other maneuvers used during routine arrests are reasonable to apprehend noncompliant suspects. *See, e.g., Oberwetter*, 639 F.3d at 555–56 (reasonable for an officer to forcefully pull the noncompliant suspect’s arm

behind her back and shove her against stone column); *Armbruster v. Frost*, 962 F. Supp. 2d 105, 109 (D.D.C. 2013) (reasonable for an officer to use a knee to press on the noncompliant plaintiff); *see also Hedgpeth v. Rahim*, 893 F.3d 802, 805 (D.C. Cir. 2018) (officer who used leg to get suspect to kneel granted qualified immunity).

**A. Officer Johnson used a reasonable amount of force.**

Officer Johnson reacted reasonably to Smith’s noncompliance. This court has found the maneuvers used by Officer Johnson to be a reasonable use of force in similar circumstances. In *Jackson v. District of Columbia*, officers pulled over the plaintiff, who was driving erratically. 83 F. Supp. 3d 158, 162 (D.D.C. 2015). When the officers asked the plaintiff to roll down his windows, he opened the door instead. *Id.* The plaintiff then closed the door, causing the officers to believe he was going to drive away. *Id.* The officers then “pull[ed] Plaintiff out of the car, . . . ben[t] and twist[ed] Plaintiff’s arm behind his back while at the same time bending his left hand in towards his forearm in a goose neck position” and “push[ed] Plaintiff in towards his car.” *Id.* The court held that the actions of the officer did not constitute excessive force because “the nature and degree of the ‘physical coercion’ the officers used to restrain Plaintiff was ‘not markedly different from what we would expect in the course of a routine arrest.’” *Id.* at 170 (quoting *Oberwetter*, 639 F.3d at 548). The court explained that “the action of pulling a person out of his or her car, bending the person’s arm behind his or her back, and applying pressure, as Plaintiff alleges the officers here did, is regularly found not to be excessive force for effectuating an arrest” and “[c]ourts have found such force not to be excessive even when the individual being arrested has not resisted or attempted to flee.” *Id.* at 171 (collecting cases).

Similarly, in *Hedgpeth*, the officer “reached for [the plaintiff’s] left arm” and “also used his knee to push the back of [the plaintiff’s] leg [to] take him down to the ground” after the

plaintiff refused to comply with the officer's multiple orders. *Hedgpeth*, 893 F.3d at 805. The court found that the officer had "authority to forcibly take down [the] suspect" during the routine arrest in part because the suspect "exhibited belligerent . . . behavior . . . [and] repeatedly refused the officers' orders" to put his hands behind his back. *Id.* at 810.

Here, Officer Johnson had to make split-second judgment in order to restrain a noncompliant suspect. *See id.* Although Officer Johnson grasped Smith's arm, turned her and pressed her against the brick wall, brought her to a kneeling position, and held her down with his knee, such actions are normal maneuvers used by officers to restrain a suspect and do not constitute excessive force. *See Jackson*, 83 F. Supp. 3d at 170–71; *see also Oberwetter*, 639 F.3d at 548 (no excessive force when officer "violently twist[ed]" the plaintiff's arm and shoved her against a pillar). Moreover, like in *Hedgpeth*, where an officer had authority to forcibly take down the plaintiff because he exhibited belligerent behavior and repeatedly refused the officers' orders, here Smith was also acting belligerently and repeatedly refused the Officers' demands. *See Hedgpeth*, 893 F.3d at 810. The Officers witnessed Smith acting belligerently when she continued to fire her squirt gun at her classmates even after one student exclaimed in pain and another told her to "[c]ut it out." Compl. ¶¶ 41–42. Additionally, Smith refused to stop running the first time Officer Johnson ordered her to, and she refused to drop the squirt gun despite Officer Johnson's repeated requests. Compl. ¶¶ 45, 56, 58. Smith's behavior and her refusal to comply with the Officer Johnson's demands authorized Officer Johnson to "forcibly take down" Smith by twisting her arm and using a leg sweep. *See Jackson*, 83 F. Supp. 3d at 170–71; *Hedgpeth*, 893 F.3d at 810. Therefore, Officer Johnson's use of force was reasonable to restrain a noncompliant Smith.

**B. Officer Murphy used a reasonable amount of force.**

Officer Murphy's use of force to get Smith to drop the squirt gun was also reasonable. The D.C. Circuit has found maneuvers like the one employed by Officer Murphy to be reasonable in similar circumstances. In *Wardlaw v. Pickett*, the plaintiff pursued officers down a stairwell as the officers attempted to carry out the plaintiff's friend, who had been disrupting a courtroom proceeding. 1 F.3d 1297, 1300 (D.C. Cir. 1993). As the plaintiff rushed towards the officers, pleading with them to not hurt his friend, the officer punched the plaintiff once in the jaw and two or three times in the chest. *Id.* The court held that the officer's use of force against the plaintiff did not constitute excessive force in part because the officer "hit [the plaintiff] no more than three or four times—all in rapid succession" and stopped when "it became apparent that [the plaintiff] was not going to attack." *Id.* at 1304. Thus, the court found that "no reasonable jury could find that [the officer's] use of force was so excessive that no reasonable officer could have believed it to be lawful." *Id.*

Similarly, here, Officer Murphy's use of force was reasonable. Although Officer Murphy hit Smith's hand and wrist three to four times with a flashlight, Officer Murphy only resorted to this tactic after Smith failed to comply with the Officers' multiple requests to drop the squirt gun. Moreover, the hits were in rapid succession and Officer Murphy stopped when Smith finally dropped the squirt gun. *See id.* Additionally, like the plaintiff in *Wardlaw* who posed a threat by rushing toward the officer, here Officer Murphy's use of force was reasonable because Smith "tr[ie]d to pull her arm away" when Officer Murphy tried to restrain it. Compl. ¶ 62; *see Wardlaw*, 1 F.3d at 1300. Therefore, like in *Wardlaw*, Officer Murphy used a reasonable amount of force to restrain a suspect and stopped applying force once "it became apparent that [Smith] was not going to attack." *Wardlaw*, 1 F.3d at 1300. As such, Officer Murphy's use of force was reasonable.

### III. Smith's injuries do not support a finding of excessive force.

Although Smith sustained some injuries from the interaction with the Officers, these injuries do not support a finding of excessive force. As both the *Oberwetter* and *Wasserman* courts noted, the fact that the plaintiff did not suffer “any serious bodily injury tends to confirm that the use of force was not excessive.” *Oberwetter*, 639 F.3d at 555; *see also Wasserman*, 557 F.3d at 641. However, the fact that a plaintiff sustained some injuries “is not by itself the basis for deciding whether the force used was excessive” but rather is simply “a relevant factor under a ‘test of reasonableness . . . not capable of precise definition or mechanical application.’” *Wardlaw*, 1 F.3d at 1304 n.7 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

In *Jackson*, the court held that the officer's use of force was not excessive even though it resulted in the plaintiff sustaining a broken arm. 83 F. Supp. 3d at 171. As the court noted, “the severity of the injury itself is not a basis for deciding whether the force used was excessive; it is only a factor to consider in light of other factors.” *Id.* Therefore, since the officer had a reasonable concern that the plaintiff would escape, even if the plaintiff was not resisting arrest, “the officers could have reasonably believed in the lawfulness of their actions even though Plaintiff's arm was broken.” *Id.*

Similarly, in *Oberwetter*, the court held that the officer used a reasonable amount of force while apprehending the plaintiff even though he “ripp[ed] apart her earbud, shov[ed] her against a pillar, and violently twist[ed] her arm” when she refused to stop dancing. 639 F.3d at 548. Although the plaintiff sustained injuries from these actions, the court noted that the officer's “actions were not markedly different from what we would expect in the course of a routine arrest” and the officer had a reasonable basis for using force in the face of a noncompliant suspect. *Id.* at 555.

Here, Smith fractured her thumb, had bruises on her face, and suffers from persisting lower back pain. Compl. ¶ 70. These injuries are like those sustained by the plaintiffs in *Jackson* and *Oberwetter* and are likewise not necessarily indicative that Officers used excessive force. *See Jackson*, 83 F. Supp. 3d at 171; *Oberwetter*, 639 F.3d at 555; *see also Wardlaw*, 1 F.3d at 1304 n.7 (noting that presence or absence of a severe injury “is not by itself the basis for deciding whether the force used was excessive”). Therefore, Smith’s injuries do not support a finding of excessive force.

Moreover, officers have the authority to use some force to effectuate an arrest. Like the officers in *Jackson* and *Oberwetter*, the Officers had the authority to “some degree of physical coercion” to apprehend Smith because she was noncompliant and posed a threat to the officers and the other students in the area. *Graham*, 90 U.S. at 396. As courts have recognized time and again, “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,” infringes on an individual’s Fourth Amendment rights. *Graham*, 490 U.S. at 396 (internal citation omitted). Some degree of deference must be given to officers attempting to maintain the peace “in circumstances that are tense, uncertain, and rapidly evolving [] about the amount of force that is necessary in a particular situation.” *Id.* at 396–97. Therefore, Smith’s injuries do not support a finding of excessive force.

[Sections omitted.]

**Applicant Details**

First Name	Christopher
Last Name	Taylor
Citizenship Status	U. S. Citizen
Email Address	<a href="mailto:christopherit491@gmail.com">christopherit491@gmail.com</a>
Address	<div> <div>Address</div> <div> <div>Street</div> <div>536 West 47th Street, Apt. 14</div> <div>City</div> <div>New York</div> <div>State/Territory</div> <div>New York</div> <div>Zip</div> <div>10036</div> </div> </div>
Contact Phone Number	801-362-2646

**Applicant Education**

BA/BS From	University of Utah
Date of BA/BS	May 2020
JD/LLB From	New York University School of Law
	<a href="https://www.law.nyu.edu">https://www.law.nyu.edu</a>
Date of JD/LLB	May 18, 2023
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Moot Court Board (Journal Equivalent)
Moot Court Experience	Yes
Moot Court Name(s)	NYU Moot Court Board

**Bar Admission****Prior Judicial Experience**

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

## Specialized Work Experience

### Recommenders

Sharkey, Catherine  
catherine.sharkey@nyu.edu  
212-998-6729

Arlen, Jennifer  
jennifer.arlen@nyu.edu  
212-992-8842

Billy, Christine  
christine.billy@gmail.com  
917-270-9703

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

June 12, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a recent graduate of New York University School of Law, writing to express my interest in a clerkship in your chambers for the 2024-2025 term, or for any other available terms after 2025.

I came to law school after a series of public-interest focused jobs, including work at a United States Attorney's office, at an LGBTQ+ nonprofit, and as a substitute high school teacher. Throughout that time, I developed an important ethic—no matter what job I am doing, my career is most meaningful when I am using my talents to make the world a gentler, more just place to live in. In law school I have tried to follow that creed: in my civil rights work at the Transgender Legal Defense and Education Fund and New York City Human Rights Commission, in my government work at the New York City Law Department, and in the many pro-bono matters I was able to take on during my summer at a firm.

Post-graduation I will be working for Selendy Gay Elsberg, PLLC, a firm I chose for its reputation in hands-on, complex commercial litigation training, its strong commitment to public interest work, and its mission to build a diverse cohort of future litigators. My long-term goal is to return to public interest or government work, and all my mentors have consistently spoken to how important a clerkship can be in that transition, and most saliently, in becoming a valuable litigator in both the private and public sectors.

Attached are my resume, writing sample, and undergraduate and law school transcripts. Letters of recommendation are forthcoming from Professors Jennifer Arlen, Catherine Sharkey, and Christine Billy. I was enrolled in Professor Arlen's 1L Corporations course, and later took her seminar on Corporate Crime, in which I wrote a research paper on a recent Supreme Court decision, *United States v. Percoco*. Professor Sharkey taught my 1L Torts course and asked me to return as a Teaching Assistant; I also worked with Professor Sharkey to update her syllabus. Professor Billy is a clinical instructor for NYU's NYC Law Department Externship program. During my semester in her clinic, I worked with her colleagues in the Appeals Division of the Law Department, and wrote and presented a pitch on local legislative reform to her and other NYC government officials. My recommenders' contact information:

Jennifer Arlen: ArlenJ@mercury.law.nyu.edu 212.992.8842  
Catherine Sharkey: catherine.sharkey@nyu.edu 212.998.6729  
Christine Billy: christine.billy@gmail.com 212-998-6703

Thank you for considering me as a candidate for a clerkship. I am excited about the cases you are trying and hope I would be a valuable asset to your chambers.

Respectfully,

/s/ Christopher Taylor

Christopher I. Taylor  
536 W. 47 St., Apt. 14  
New York, NY 10036  
(801) 362-2646  
cit6216@nyu.edu

**CHRISTOPHER TAYLOR**

(801) 362-2646 / (he/him/his)  
cit6216@nyu.edu

**EDUCATION**

**NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, NY

Candidate for J.D., May 2023

Honors: Robert McKay Scholar (Top 25% of class after four semesters' cumulative grades)  
Moot Court Board (Journal Equivalent), *Casebook Associate Executive Editor*  
CLEA (Clinical Legal Education Association), Outstanding Externship Student Award  
Lawrence Green Prize for Best Moot Court Problem (*Casebook*, Vol. 47)

Activities: HIV Law Society, Housing Works Student Advocate  
Identity Documents Project Student Advocate  
SBA Corporations Peer Tutor  
Law and Government Society Student Mentor  
OUTLaw Board, Professional Development Co-Chair  
Teaching Assistant for Professor C. Sharkey (Torts)

**UNIVERSITY OF UTAH**, Salt Lake City, UT

B.A., *summa cum laude*, May 2020

Majors: Comparative Literary and Cultural Studies; German Studies  
Senior Thesis: *Scheherazade's Vienna: Erotic and Thanatic Figures in von Hofmannsthal and Schnitzler*  
Honors: Honors College Graduate, Dean's List (4 semesters), Eta Sigma Phi Classics Society  
Activities: Writing Center Tutor, published in *The Canticle* (student literary journal), Latin minor

**EXPERIENCE**

**NEW YORK CITY COMMISSION ON HUMAN RIGHTS**, New York, NY

**Law Enforcement Intern: LGBTQ Rights Externship**, Jan 2023 - Present

Drafted conciliation agreement in a transgender hostile work environment case against a large multinational corporation.  
Researched and investigated claimants and respondents in LGBTQ and HIV discrimination cases in NYC.

**SELENDY GAY ELSBERG PLLC**, New York, NY

**Summer Associate**, May 2022 - July 2022

Drafted discovery modules for a plaintiff-side shareholder litigation case. Drafted memo on a startup's tortious interference claims under California law. Drafted verified petition for a NYS Article 78 review of a parole hearing. Drafted research memoranda on LGBTQ+ tax law, FOIL requests, NYS civil procedure, and Utah solar energy regulation.

**NEW YORK CITY LAW DEPARTMENT**, New York, NY

**Legal Extern, Appeals**, Jan 2022 - April 2022

Drafted a brief for the appeal of an Article 78 proceeding to a NYS Appellate Division Court containing federal FMLA claims, NYC Human Rights Law claims, and procedural issues. Researched and drafted memoranda on employment, constitutional, insurance regulatory, tort and family law. Mooted colleagues for appellate arguments before NYS Appellate Division Courts.

**TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND (TLDEF)**, New York, NY

**Summer Legal Intern**, May 2021 - July 2021

Researched and drafted legal memoranda on healthcare and insurance law, as well as contract, constitutional and criminal law. Drafted demand letters to healthcare providers. Drafted a regulatory comment on trans healthcare. Conducted intake interviews.

**THE OUT FOUNDATION**, Provo, UT

**Development Coordinator (Volunteer)**, March 2019 - September 2020

Organized development and sourced grants for an LGBTQ+ alumni association for LDS-affiliated (Mormon) universities.

**UNITED STATES ATTORNEY'S OFFICE, DISTRICT OF UTAH**, Salt Lake City, UT

**Student Trainee: Clerical**, September 2019 - April 2020

Provided administrative and IT support to paralegals and attorneys. Managed personnel files. Assisted in grand jury prep.

**ADDITIONAL INFORMATION**

Advanced German language skills. Volunteer full-time LDS missionary, two years. Former 4-H at-risk-youth mentor, LDS Church youth leader, substitute high school teacher, and captioner for the hard-of-hearing. Outdoors enthusiast.

Name: Christopher I Taylor  
 Print Date: 06/11/2023  
 Student ID: N13119736  
 Institution ID: 002785  
 Page: 1 of 1

New York University  
 Beginning of School of Law Record

Degrees Awarded

05/17/2023

Juris Doctor  
 School of Law  
 Major: Law

Fall 2020

School of Law  
 Juris Doctor  
 Major: Law

Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Ashley Binetti Armstrong			
Criminal Law		LAW-LW 11147	4.0	A-
Instructor:	Randy Hertz			
Procedure		LAW-LW 11650	5.0	B
Instructor:	Geoffrey P Miller			
Contracts		LAW-LW 11672	4.0	A-
Instructor:	Florencia Marotta			
1L Reading Group		LAW-LW 12339	0.0	CR
Topic:	Challenging God: Moral Reading			
Instructor:	Joseph Weiler			

AHRS  
 15.5  
 Cumulative  
 15.5

Spring 2021

School of Law  
 Juris Doctor  
 Major: Law

Corporations		LAW-LW 10223	4.0	A
Instructor:	Jennifer Hall Arlen			
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Ashley Binetti Armstrong			
Legislation and the Regulatory State		LAW-LW 10925	4.0	A
Instructor:	Adam M Samaha			
Torts		LAW-LW 11275	4.0	A-
Instructor:	Catherine M Sharkey			
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor:	Joseph Weiler			
Financial Concepts for Lawyers		LAW-LW 12722	0.0	CR

AHRS  
 14.5  
 Cumulative  
 30.0

Fall 2021

School of Law  
 Juris Doctor  
 Major: Law

Survey of Securities Regulation		LAW-LW 10322	4.0	A
Instructor:	Stephen J Choi			
Basic Bankruptcy		LAW-LW 11460	4.0	B+
Instructor:	Arthur Joseph Gonzalez			
Orison S. Marden Moot Court Competition		LAW-LW 11554	1.0	CR
Evidence		LAW-LW 11607	4.0	B+
Instructor:	Daniel J Capra			

AHRS  
 13.0  
 Cumulative  
 43.0

Spring 2022

School of Law  
 Juris Doctor  
 Major: Law

Sexuality, Gender and the Law Seminar		LAW-LW 10529	2.0	A
Instructor:	Travis J Tu			
Teaching Assistant		LAW-LW 11608	2.0	CR
Instructor:	Catherine M Sharkey			
Constitutional Law		LAW-LW 11702	4.0	A-
Instructor:	David A J Richards			
NYC Law Department Externship Seminar		LAW-LW 12464	2.0	A
Instructor:	Christine Mae Billy			
NYC Law Department Externship		LAW-LW 12501	3.0	CR
Instructor:	Christine Mae Billy			
	Hilary Meltzer			

AHRS  
 13.0  
 Cumulative  
 56.0  
 McKay Scholar-top 25% of students in the class after four semesters

Fall 2022

School of Law  
 Juris Doctor  
 Major: Law

Family Law		LAW-LW 10729	4.0	B
Instructor:	Melissa E Murray			
Professional Responsibility and the Regulation of Lawyers		LAW-LW 11479	2.0	A-
Instructor:	Hakeem Sakou Jeffries			
	Debo Patrick Adegbile			
Moot Court Board		LAW-LW 11553	1.0	CR
Federal Courts and the Federal System		LAW-LW 11722	4.0	CR
Instructor:	Roderick M Hills			
Corporate Crime and Financial Misdealing:		LAW-LW 12243	2.0	A
Legal and Policy Analysis Seminar				
Instructor:	Jennifer Hall Arlen			
	Joseph P Facciponti			

AHRS  
 13.0  
 Cumulative  
 69.0

Spring 2023

School of Law  
 Juris Doctor  
 Major: Law

Colloquium On Culture and Law		LAW-LW 10650	2.0	A
Instructor:	Joseph Weiler			
LGBTQ Rights Externship		LAW-LW 11130	3.0	A
Instructor:	Hayley Jill Gorenberg			
LGBTQ Rights Externship Seminar		LAW-LW 11483	2.0	A
Instructor:	Hayley Jill Gorenberg			
Moot Court Board		LAW-LW 11553	1.0	CR
Property		LAW-LW 11783	4.0	B
Instructor:	Katrina M Wyman			
Urban Environmental Law and Policy Seminar		LAW-LW 12603	2.0	A-
Instructor:	Danielle H Spiegel			
	Katrina M Wyman			

AHRS  
 14.0  
 Cumulative  
 83.0

Staff Editor - Moot Court 2021-2022  
 Casebook Associate Executive Editor - Moot Court 2022-2023

End of School of Law Record

June 12, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Christopher Taylor for a clerkship in your chambers. I initially came to know Christopher as a student in my 1L Torts class during the Spring 2021 semester (in which he earned an A-). Based on his strong performance, which included regularly making valuable contributions to class discussion, I selected him to be one of my teaching assistants (TAs) during the Spring 2022 semester, and am very glad to have done so.

Christopher, along with his fellow TAs, helped me review and update the Torts class syllabus over the summer of 2021. Christopher was responsible for reading and updating the sections on negligence, medical malpractice, and *res ipsa loquitur*, and he added tremendous value. He showed creativity and engagement with the material with his proposed revisions, including, for instance, his addition of a case that addressed the intersection of physical disability and the reasonable person status. He also refined and shortened the medical malpractice readings in ways that I felt greatly improved the syllabus, and augmented the readings with key excerpts from the Restatement (Third) on Torts. He also helped supplement the syllabus and class discussion with a memo addressing jury instructions on the issue of necessity. Christopher was also highly regarded by the students in his discussion section, and he took the time to devise creative ways to make each session as helpful to them as possible.

On a personal level, Christopher is a bright, mature, focused young man, and he is a pleasure to work with. His resume reflects uncommon dedication to LGBTQ issues; not only have many of his jobs and internships focused around such issues, but he has devoted his time at the law school to co-chairing the OUTLaw Board, amongst his other activities. Moreover, he has done so while maintaining an impressive GPA, reflecting his ability to manage his time well and to meet all of his obligations.

I believe Christopher would be a valuable asset to your chambers and I hope you will seriously consider him as a candidate.

Sincerely,  
Catherine M. Sharkey  
Segal Family Professor of  
Regulatory Law and Policy

Catherine Sharkey - catherine.sharkey@nyu.edu - 212-998-6729



Program on  
Corporate Compliance  
and Enforcement  
New York University School of Law

**Jennifer H. Arlen**

Norma Z. Paige Professor of Law  
Faculty Director, Program on Corporate Compliance and Enforcement

40 Washington Square South, 411D  
New York, NY 10012  
Telephone: (212) 992-8842  
jennifer.arlen@nyu.edu

May 16, 2023

**RE: Christopher Taylor**

Dear Judge:

I am writing to recommend Chris Taylor (NYU 2023) for a judicial clerkship in your chambers. I have known Chris since his first year at NYU and am confident he would be an exceptional clerk. He is smart, insightful, hard-working, diligent, and is a pleasure to be around. He would be an asset to your chambers.

I first had the pleasure of teaching Chris when he enrolled in my 1L elective Corporations course. Though this was a smaller elective course with just a handful of students, we still covered four full credits of material that is often quite challenging for first-year law students. Because we were a smaller group and I require all my students to be “on-call” for each class session, Chris and I engaged over the materials nearly every day of the course. Chris consistently impressed me with both his preparedness in reading and responding to the materials, and also with his ability to quickly grasp difficult legal concepts and apply them to new cases. He demonstrated these skills once again on my final exam for the course, where I was happy to award him an A grade.

This past year, Chris was a student in my small-group seminar on Corporate Crime and Financial Misdealing. Chris once again distinguished himself with his eagerness and ability to engage with the material. It is a challenging class. We cover a wide-range of topics including federal corporate criminal enforcement policy, monitors, health care fraud, cybersecurity, data privacy, and crypto currency. We also invited experts in these fields to talk to the students directly about the course topics. Chris was always prepared with excellent and challenging questions for our guest speakers. I particularly remember an exchange Chris had with Steve Solow, the former monitor of Carnival Cruise Lines, about the role of company culture in corporate compliance, and how that culture might operate independently of formal compliance programs. During that class, and nearly every class, I knew I could count on Chris to showcase our students’ careful legal analysis and creative problem-solving.

During that seminar, Chris also wrote a paper analyzing a case argued before the Supreme Court in the 2022 term, *United States v. Percoco*. The question presented in that case is whether former or future public officials can be charged under the honest services mail fraud statute. Chris’ paper focused on crafting a theory of liability that captured the defendant’s conduct while also leaving room for legitimate ‘revolving-door’ activities of lobbyists and the like. Chris built his new theory of liability on careful research of caselaw from across jurisdictions, and on novel analysis of the Restatement (Third) of Agency. He conducted independent legal research and took a fresh approach to the issues. He also was one of the most diligent students in turning in drafts throughout the semester, enabling us to engage in two successive rounds of feedback before he turned in his

May 16, 2023  
Page 2

final draft. He responded thoughtfully and comprehensively to all suggestions to strengthen his analysis. His final analysis was insightful and creative. His paper earned an A-grade, but more importantly it demonstrated that Chris's ability to engage in legal research and writing. Chris' paper demonstrates exactly the kind of analysis most useful in a judicial clerk.

My colleagues recognized his insight. Professor Catherine Sharkey selected him to serve as a Teaching Assistant for her 1L torts class. Chris both helped many of his classmates better understand a difficult 1L course, but also worked with Professor Sharkey to expand her syllabus, including to incorporate cases on physical disability and the reasonable person standard. In addition, the Office of Student Affairs hired him as a tutor for corporations courses, helping other students understand the concepts he mastered in my course.

Chris has demonstrated his preparedness for service as a judicial clerk outside my classroom as well. Chris worked as an associate executive editor for the Moot Court Board's Casebook, which operates at NYU Law as a journal. The Casebook is a collection of moot court problems published yearly by the school and used across the country by other schools and legal professionals. As part of his service on the Moot Court Board's executive board, Chris worked with other students to edit, organize and direct the publication of the latest Casebook volume. He personally oversaw the editing and publication of several problems, each of which consisted of a bench memo outlining the legal issues underlying a current circuit split, and a 'record' for use by students in competitions and legal writing exercises. Chris was also the principal editor for the two problems argued in the school's internal Orison S. Marden Moot Court Competition, the final round of which was argued in front of three federal judges. For the latest Casebook volume, Chris also authored his own problem and was awarded the Lawrence Green Prize for Best Casebook Problem.

Chris has a deep commitment to public service. He has been active in student organizations and gained practical clinical experience while in law school. In 2022, he was a legal extern for the appeals division of the NYC Law Department. Last year, he was a Law Enforcement Intern for the NYC Commission on Human Rights. Within the law school, Chris also served as a mentor in the school's Law and Government Society, helping new students navigate the difficult landscape of legal education while pursuing careers in public interest and government work.

Overall, Chris has demonstrated during his time at NYU that he is a thoughtful, insightful mind who is committed to using his talents in the public's interest. I hope you will strongly consider him for a position in your chambers.

Sincerely,

Jennifer Arlen  
Norma Z. Paige Professor of Law  
Faculty Director, Program on Corporate Compliance and Enforcement  
New York University School of Law



HON. SYLVIA O. HINDS-RADIX  
*Corporation Counsel*

THE CITY OF NEW YORK  
**LAW DEPARTMENT**  
100 CHURCH STREET, ROOM 6-146  
NEW YORK, NY 10007-2601

CHRISTINE BILLY  
*Senior Counsel*  
*Legal Counsel Division*

April 6, 2023

**RE: Christopher Taylor, NYU Law '23**

Your Honor:

I am delighted to recommend Christopher Taylor for a judicial clerkship in your chambers. I had the pleasure of teaching Chris at NYU Law School in the New York City Law Department Clinic in the spring of 2022. The course includes a 10-hour/week externship at the New York City Law Department, a 2-hour seminar each week, and a final paper. Chris excelled at all three. His clarity of thinking, hard work, and positive and collaborative attitude distinguished him among his peers. He would be a welcome addition to any judicial chambers.

As a course instructor, I greatly appreciated Chris' constructive participation in the seminar discussions each week. In his comments, he offered an engagement with the substantive materials, as well as the ability to draw connections with relevant subject matter from other coursework. In his comments, Chris showed notable maturity in his ability to engage with contrary viewpoints in a thoughtful way that often enriched and elevated our class discussions.

Chris particularly excelled in his written work. His final project involved an assessment of First Amendment challenges to "conversion therapy" bans, in which he offered a proposed framework for local legislation on this topic in New York City. In the course of writing the paper, Chris sought out and effectively incorporated professor feedback, as well as input from subject matter experts at the NYC Department of Consumer and Worker Protection (DCWP), the City agency that would be responsible for enforcing such a law. The final product was well researched, well written, and demonstrated exceptional legal analysis on the First Amendment on a level that surpassed what I am accustomed to seeing among law students that take this course. The paper also showed distinction in its deep engagement with the topic, and it had valuable practical application. Chris' proposal involved a thoughtfully crafted public participation process to gather input from advocates and community stakeholders, illustrating his understanding of key class themes relating to local democracy. For these reasons, we have shared Chris' paper with subsequent students as a model final paper, and DCWP has asked to review it as a resource for their attorneys.

As part of the course, Chris worked as an extern in the Appeals Division of the New York City Law Department during the spring of 2022. Chris worked directly with nine

Christopher Taylor, NYU Law '23  
April 6, 2023  
Page 2

attorneys, and they were unanimous in their strong praise of his work. They described him as smart, diligent, and easy to get along with. In particular, they noted that his work product was well-organized and on time, and that he demonstrated initiative and follow-through during the externship. They praised his strong research and writing skills and entrusted him with drafting appellate briefs for the division. They also praised his strong oral advocacy skills when explaining legal issues to attorneys and clients. Based on the high quality of Chris' work, they expressed an interest in having him work in the division in the future.

For all of these reasons, I recommend Chris wholeheartedly for a clerkship. Please feel free to call me if you have any questions.

Sincerely,

/s/

Christine Billy

Senior Counsel,  
Legal Counsel Division

Adjunct Professor of Clinical Law  
NYU School of Law  
[christine.billy@nyu.edu](mailto:christine.billy@nyu.edu)  
917.270.9703



NYU | LAW

# MOOT COURT BOARD

Distant Horizons Counseling, LLC,  
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-against-

Basil Hullwurd,  
Director of Steubensia Board of Medical Examiners  
Respondent.

Memorandum of Law

Prepared by:  
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**Please note: This Memorandum was prepared, edited and published as part of my membership on NYU's Moot Court board. It presents a fictional hypothetical case in federal court dealing with First Amendment issues.**

### **QUESTIONS PRESENTED**

- (1) Whether strict scrutiny applies to bans on sexual orientation change efforts (“SOCE”) and gender identity change efforts (“GICE”) under the First Amendment.
- (2) Whether SOCE and GICE bans withstand the respective level of First Amendment judicial scrutiny.

### **STATEMENT OF FACTS**

Sexual orientation change efforts (“SOCE”) and gender identity change efforts (“GICE”), both commonly known as “conversion therapy,” are practices by medical and mental health professionals designed to reduce or eliminate a person’s same-sex attractions, or to bring a person’s gender identity in line with their sex assigned at birth. Practitioners use techniques such as talk therapy; aversive conditioning including shock therapy, hypnosis, masturbation or pornographic conditioning; and other psychological (or pseudo-psychological) strategies to reorient subjects.<sup>1</sup> These therapies have been decried by the psychological and medical communities as flawed and dangerous practices, which are also unlikely to be successful.<sup>2</sup> Consistent with this consensus among the medical community, the State of Steubensia has decided to ban the practice of “conversion therapy” for minors.

After the 2020 legislative session, Section 626 (§ 626) was added to the state’s Business and Professions Code, which regulates the licensing of mental health providers by the state. Section 626.1 defines SOCE and GICE, and then provides in § 626.2 that: “[N]o licensed mental health worker, except clergy, shall engage in sexual orientation or gender identity change efforts with patients under the age of 18 . . . . [L]icensed mental health workers who engage in such attempts will be subject to professional discipline.” Ex. A, at 14. Section 626.3 qualifies this prohibition, such that “nothing in this statute should be understood to endorse a particular viewpoint about the mutability of gender or sexual orientation; nor are therapists prohibited from discussing their views about that mutability with patients outside therapy.” *Id.*

<sup>1</sup> See, e.g., Am. Med. Ass’n, *Issue Brief: LGBTQ change efforts (so-called “conversion therapy”)* (2019) [hereinafter *AMA Issue Brief*], <https://www.ama-assn.org/system/files/2019-12/conversion-therapy-issue-brief.pdf> (last visited Nov. 7, 2022) (detailing the various techniques for SOCE and GICE and their inefficacy).

<sup>2</sup> See, e.g., *AMA Issue Brief*, *supra* note 1 (detailing the inefficacy of SOCE and GICE and resulting social and psychological harm); Am. Psych. Ass’n, *Report of the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation* app. A, at 121, <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> (last visited Nov. 7, 2022) (detailing the same).

In the official legislative history accompanying the 2020 Steubensia legislative session, several findings and reports were included. Among them:

- Reports from Steubensia State Medical and Psychiatric Associations summarizing the research on SOCE and GICE, and stating official opinions against it. Ex. B, at 15–16.
- A summary report from a longitudinal case study of 80 LGB men and women, conducted at Steubensia State University, highlighting the detrimental effects of SOCE. Ex. C, at 17–18.
- A list of other states that have successfully implemented SOCE and GICE bans. Ex. D, at 19.

Petitioner, Distant Horizons Counseling, LLC (“Distant Horizons”) is a self-proclaimed treatment center for those who wish to “eliminate same-sex attraction,” or to “alleviate gender dysphoria without undergoing a gender transition.” Distant Horizons believes that the 2020 SOCE and GICE bans violate their constitutional rights under the First Amendment.

Located a few miles outside Steubensia City, Steubensia, Distant Horizons holds a summer camp for teens seeking treatment, and they also have a year-round treatment program for adults. Three full-time counselors are employed at the camp, two of whom are licensed clinical social workers in the state of Steubensia, and a third who is a licensed psychologist with a Ph.D. from Steubensia State University. These counselors treat both children and adults. They employ talk and group therapy to encourage heterosexual attraction, to discourage same-sex attraction, and to discourage those with gender dysphoria from transitioning. Distant Horizons is not affiliated with a particular religious group, but all three counselors self-identify as Christian.

### **PROCEDURAL POSTURE**

After the 2020 legislative session, Distant Horizons filed a lawsuit in federal court in the District of Steubensia against Basil Hullwurd, the Director of the Board of Medical Examiners of the State of Steubensia. Distant Horizons claimed that the statute, both facially and as applied to therapists of minor patients, violated the First Amendment right to free speech. Distant Horizons sought a preliminary injunction to enjoin enforcement of the statute against their therapists for the treatment of minor patients. They have paused their summer camp for children until they receive the requested injunction, but they continue to offer treatment for adults.

The district court found for Distant Horizons and granted the preliminary injunction, holding that strict scrutiny should be applied to the SOCE and GICE ban, and that the statute would likely not withstand strict scrutiny. The Government filed

an interlocutory appeal to the Court of Appeals for the Fourteenth Circuit, pursuant to 28 U.S.C.A. § 1291(a)(1).

The circuit court reversed the lower court’s decision, finding the district court abused its discretion by granting the preliminary injunction because the circuit court determined that talk therapy was speech “incidental to regulated conduct,” and should thus be evaluated using intermediate scrutiny. Under intermediate scrutiny, that court surmised that the statute would almost certainly be constitutional, and that Distant Horizons had no likelihood of success on the merits—warranting no preliminary injunction. *Distant Horizons, LLC v. Hullwurd*, 123 R.S.S. 456 (D. Steubensia 2021); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 19–20 (2008) (explaining the standard for a preliminary injunction). Distant Horizons petitioned the Supreme Court for a writ of certiorari. Cert was granted.

### SUMMARY

SOCE and GICE are controversial practices, and Steubensia is not the first government to ban them. Previously, SOCE bans had been upheld by the Third and Ninth Circuits. *See King v. Governor of N.J.*, 767 F.3d 216, 246 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1236 (9th Cir. 2014). Both bans were challenged on free speech grounds, and both were upheld under variations of the “professional speech” exemption to First Amendment strict scrutiny analysis. *King*, 767 F.3d at 236; *see also Pickup*, 740 F.3d at 1229.

However, the Supreme Court called into question the “professional speech” exemption in an abortion regulation case, *Nat’l Inst. of Fam. and Life Advoc. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2375 (2018) applying strict scrutiny to content-based speech because none of the circuits had “identified a persuasive reason for treating professional speech as a unique category” but not “foreclos[ing] the possibility that some such reason exists.”). The next circuit to take up the specific question of SOCE and GICE was the Eleventh Circuit, which held in *Otto v. City of Boca Raton* that a prohibition on SOCE and GICE violated free speech principles under strict scrutiny, consistent with *NIFLA*’s holding. *See* 981 F.3d 854, 868 (11th Cir. 2020), *reh’g en banc denied*, 41 F.4th 1271 (11th Cir. 2022). Thus, a circuit split on the SOCE and GICE issue has been created, with the majority of courts’ principal reasoning for applying intermediate scrutiny now abrogated by the Supreme Court. This leaves two questions undecided: (1) which level of judicial scrutiny should apply to SOCE and GICE bans, and (2) whether SOCE and GICE bans are viable under the correct level of judicial scrutiny.

In this case, the parties will first need to present their arguments as to which level of judicial scrutiny should be applied. Petitioner, Distant Horizons, will argue (1) for the application of strict scrutiny, following *Otto*’s holding that speech is speech, even when under the guise of talk therapy, and (2) for additional protections beyond

even strict scrutiny under the First Amendment doctrine of viewpoint-based restrictions. Meanwhile, the Government will urge the Court to apply intermediate scrutiny, construing the statute as simply a restriction on speech incidental to the regulation of professional conduct, consistent with *NIFLA*'s holding.

Once the parties have made their case for an appropriate standard of review, they will need to present a case as to why the statute should either be upheld or overturned under that standard. Strict scrutiny requires a statute that is narrowly tailored to address a compelling government interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). Intermediate scrutiny requires that a statute further an interest that is both within the government's power and unrelated to free expression, and that there is not a less restrictive alternative. *United States v. O'Brien*, 391 U.S. 367, 376—77 (1968).

To meet either of these standards, Distant Horizons will point to (1) the lack of empirical research on SOCE and GICE, as well as (2) the potential under inclusiveness of Steubensia's statute, and (3) the severity of government imposition on the patient-therapist relationship. The Government will point to (1) the strong disapproval of SOCE and GICE within the medical and psychological communities, (2) recent research and testimony suggesting that these practices are harmful, and (3) case law supporting the government's interest in protecting children's psychological welfare.

## DISCUSSION

### **I. Parties Will Argue Over Which Standard of Constitutional Review a Court Should Apply to SOCE and GICE Bans.**

Petitioner, Distant Horizons, will argue for the application of strict scrutiny because § 626 is at least a content-based restriction—if not a viewpoint-based restriction—on therapists' free speech. Respondent, the Government of Steubensia, will argue that strict scrutiny is inappropriate here because (1) these are not content- or viewpoint- based restrictions, (2) the Court should exempt professional speech from strict scrutiny review, and (3) the statute is a regulation of medical conduct with an incidental effect on speech.

#### **A. Parties Will Debate Whether the Restriction Is a Content- or Viewpoint- Based Restriction of Speech.**

Courts presume that government-imposed content-based restrictions on speech are unconstitutional, as opposed to content-neutral restrictions. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The constitutionality of these content-based restrictions is evaluated under strict scrutiny, which requires that the government have a compelling interest in restricting the content of speech, and that the law be

narrowly tailored to that interest. *Id.* at 171; *see also City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (defining both content-based and content-neutral restrictions and holding that strict scrutiny applies to the former).

According to the Court's precedent, even more egregious than content-based restrictions are viewpoint-based restrictions, a form of content-based restriction that prohibits particular political or ideological positions. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). These restrictions are almost *per se* unconstitutional and are subject to the highest level of scrutiny in the First Amendment context. *See Otto v. City of Boca Raton*, 981 F.3d 854, 864 (11th Cir. 2020), *reh'g en banc denied*, 41 F.4th 1271 (11th Cir. 2022) (quoting *Members of the City Council vs. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.")) (suggesting that there is an argument based in Supreme Court precedent for the *per se* unconstitutionality of viewpoint discrimination). Even if the regulated speech belongs to a category which normally receives no First Amendment protection, a viewpoint-based restriction on that speech will likely be found unconstitutional. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (holding that the prohibition of specifically racist obscene speech, as opposed to obscene speech generally, was viewpoint-based discrimination and presumptively unconstitutional).

In this case, the statute bans any attempt to change sexual orientation or gender identity, including by strictly engaging in talk therapy. Such a restriction, Respondent will argue, may very likely be content-based, as it prohibits the discussion of certain topics within the therapeutic context. *See, e.g., King v. Governor of New Jersey*, 767 F.3d 216, 236 (3d Cir. 2014) (holding, though a SOCE ban was content-based, that for other reasons strict scrutiny should not be applied); *see also Wollschlaeger v. Governor*, 848 F.3d 1293, 1307 (11th Cir. 2017) (finding a statute restricting speech on gun ownership in patient conversations was content-based). Petitioner will still likely try to argue that this is not content-based, citing *Pickup v. Brown* for the proposition that regulation of conduct is not a content-based speech restriction. 740 F.3d 1208, 1228 (9th Cir. 2014).

If this Court finds this is a content-based restriction, it should also consider whether viewpoints are being restricted. When a restriction is also considered a viewpoint-based restriction, it is unlikely that it will survive any form of scrutiny and may even be unconstitutional *per se*. *See Rosenberger*, 515 U.S. at 829 (finding viewpoint discrimination is a "blatant" violation of constitutional rights); *Taxpayers for Vincent*, 466 U.S. at 804 (prohibiting the government from favoring certain viewpoints in speech restrictions); *but see Morse v. Frederick*, 551 U.S. 393, 410 (2007) (authorizing, in the school speech context, a restriction construable as viewpoint-

based discrimination to prevent the promotion of drugs in schools). Thus, Petitioner will argue that the statute restricts both the content of therapists' speech and their particular viewpoint, while Respondent will urge the court not to find viewpoint-based restriction in this statute.

**1. Respondent will argue that the Court should not find viewpoint-based discrimination or content-based discrimination here.**

Respondent, consistent with the court's reasoning in *King*, will argue that this is not viewpoint-based discrimination because it does not prevent therapists from speaking about the possible mutability of sexual orientation, it only prevents them from engaging in efforts with their own patients to change sexual orientation. See 767 F.3d at 237. Public advocacy for SOCE, as well as private conversations outside of the patient-therapist relationship, are not banned by this statute, as was the case in *King*. *Id.*

Respondent will argue that this statute is more narrow than other SOCE bans. This statute, unlike those previously seen in SOCE bans, specifically neither endorses nor expresses views on sexual orientation or gender mutability. The statute also expressly allows the discussion of those views outside the context of therapy and treatment. This may give weight to Respondent's argument against viewpoint-based discrimination, since it highlights that the practice of SOCE itself is banned, not expressing viewpoints on SOCE. *Cf. Pickup* 740 F.3d at 1229 (upholding a bill that "bans a form of treatment for minors; [but] does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients.").

Respondent may also attempt to argue against content-based discrimination, but this is a more difficult argument, as even courts friendly to SOCE bans have struggled to view them as anything but a restriction of the content of therapists' speech. See *King*, 767 F.3d at 236 (holding that a SOCE ban is at least content-based discrimination). Respondent may try to argue that these are merely restrictions on a particular kind of therapeutic practice and not on speech at all, as therapists are explicitly allowed under Steubensia's statute to discuss sexual orientation change efforts with patients outside of therapy. § 626.3; Ex. A; see also *Pickup*, 740 F.3d at 1229 (applying rational basis review since a SOCE ban was found to be a proscription only on conduct).

**2. Petitioner will argue that the statute impermissibly restricts both the content of therapists' speech and specific viewpoints.**

Petitioner will ask the court to embrace the *Otto* court's view that prohibitions of sexual orientation and gender identity change efforts likely restrict certain viewpoints, and certainly restrict the content of speech. *Otto*, 981 F.3d at 864. Petitioner may also argue that, because of the exemption in the statute for counseling a person through a gender transition, the statute implicitly endorses the viewpoint that gender is mutable but sexual orientation is not. *Id.* (arguing the same based on a similar statutory exemption). This is likely undercut by the specific language of Steubensia's statute, which expressly declines to endorse or prohibit any viewpoints on gender mutability. However, the statute might still be read as codifying the viewpoint in practice. *See id.*

As for the argument that this statute does not ban speech about SOCE, only SOCE itself, Petitioner may refer to *Otto*'s proposition that therapist's ideas must be able to find expression in their practice in order to have any use. *Id.* at 863 (“[W]hat good would it do for a therapist whose client sought SOCE therapy to tell the client that she thought the therapy could be helpful, but could not offer it?”). Additionally, if therapists can only advocate for their viewpoint *outside* of the context most relevant to them, this in essence neuters their First Amendment protections. *Id.* (“[T]he constitutional problem posed by speech bans like this one is not mitigated when closely related forms of expression are considered acceptable.”).

**B. Petitioner Will Argue That SOCE and GICE Bans Should Be Evaluated Under Strict Scrutiny; Respondent Will Argue That These Bans Should Be Exempted from Strict Scrutiny.**

Ordinarily, content—and especially viewpoint—based restrictions on free speech are evaluated under strict scrutiny. *Cf. Reed.*, 576 U.S. at 163. This is a demanding standard that will be unfriendly to Respondent, who will likely put forth arguments that the Court should exempt these content-based restrictions from the normally applicable standard. *Id.* (holding that content-based restrictions are presumptively unconstitutional). However, the exemption for “professional speech” used in previous SOCE cases has now been foreclosed by the Supreme Court, which will force Respondent to turn elsewhere. *Nat’l Inst. of Fam. and Life Advoc. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2375 (2018). Thus, Respondent and Petitioner will likely argue about whether the statute can be construed as regulating only speech incidental to conduct. *See Pickup*, 740 F.3d at 1229 (holding that SOCE bans regulate only conduct and are not subject to strict scrutiny).

**1. The “professional speech” exemption from strict scrutiny likely does not prevail after *National Institute of Family and Life Advocates v. Becerra*.**

Previous statutes outlawing SOCE have been exempted, as “professional speech,” from the strict scrutiny review normally applied to content-based regulations. *See King*, 767 F.3d at 232; *Pickup*, 740 F.3d at 1228. This was consistent with other circuit court decisions at that time, which had broadly exempted, from First Amendment strict scrutiny, any speech by state-regulated professionals within their professional relationships with patients or clients. *See, e.g., Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1219 (11th Cir. 2014), *opinion vacated and superseded on reh’g en banc sub nom. Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017) (applying professional speech exemptions to doctors); *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (applying professional speech exemptions to fortunetellers). In creating this exemption to First Amendment protections, circuit courts drew on the logic of the Supreme Court in decisions which upheld limitations on commercial speech and professional speech incidental to conduct. *See, e.g., Pickup*, 740 F.3d at 1228 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992)<sup>3</sup>).

However, this entire line of cases, and more specifically the “professional speech” exemption, were most likely abrogated in 2018 by *NIFLA*. 138 S. Ct. at 2375. In that case, which concerned mandated abortion disclosures in California pregnancy health clinics, the Supreme Court held that circuit courts had identified no “persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.” *Id.* Given that the lines of reasoning in both *King* and *Pickup* were explicitly denounced by the Supreme Court, Petitioner has a strong argument that the Court should not now apply the professional speech exemption to SOCE/GICE. *Cf. NIFLA*, 138 S. Ct. at 2371–72 (highlighting a lack of precedent for recognizing “professional speech” as a special category). In fact, consistent with that *de facto* overruling, the Eleventh Circuit in *Otto* found that the professional speech between therapists engaging in SOCE was not exempt from First Amendment protections. 981 F.3d at 861 (applying strict scrutiny to a SOCE ban in light of the holding in *NIFLA*).

However, the Court in *NIFLA* did not “foreclose the possibility that some such reason [for a professional speech exemption] exists.” 138 S. Ct. at 2375. This may give Respondent some room to argue for a limited reinstatement of a professional exemption consistent with *NIFLA*’s holding. *See id.* at 2382 (Breyer, J., dissenting). Respondent could rely on policy arguments that emphasize states’ interest in

<sup>3</sup> *Casey*, 505 U.S. 833, addressed both the constitutional right to abortion under the right to privacy and compelled speech First Amendment concerns. The Supreme Court’s 2022 decision in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022), which eliminated the constitutional right to abortion, left the First Amendment precedent in *Casey* untouched.

ensuring access to reliably safe and evidence-based psychological treatment, even in the face of a doctor's constitutional rights or personal beliefs. *See id.* (Breyer, J., dissenting) ("Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon . . ."). After the *NIFLA* decision, the original plaintiffs in *King* made a motion to recall the mandate of the Third Circuit; this motion was denied on procedural grounds, and the Supreme Court did not grant certiorari. *King v. Governor of N.J.*, No. 13-4429, 2018 WL 11303632, at \*1 (3d Cir. Oct. 11, 2018), *cert. denied sub nom. King v. Murphy*, 139 S. Ct. 1567 (2019). So, Respondent's argument that *NIFLA* does not *expressly* overrule *King* and *Pickup* has at least some weight, given that the Court has already passed on one opportunity to recall those cases.

**2. Respondent will argue that this statute regulates speech incidental to conduct and thus should be subject to intermediate scrutiny under the *O'Brien* standard.**

Since the professional speech exemption is at least partially foreclosed, Respondent will need to look elsewhere to prevent this statute from falling under strict scrutiny. Another possibility for avoiding strict scrutiny might be to view the restricted speech under the *O'Brien* standard, where the Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Incidental free speech restrictions evaluated under the *O'Brien* standard are subject to an intermediate level of scrutiny, a less demanding test that only requires "(1) the interest served is within the power of the government; (2) the regulation furthers that interest; (3) the interest served is unrelated to free expression; and (4) there is no less restrictive alternative." *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996 (11th Cir. 1998) (citing *O'Brien*, 391 U.S. at 377).

However, the line must be carefully drawn when a statute proscribing certain conduct nevertheless creates clear content-based restrictions on speech; these cases are still subject to strict scrutiny. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010); *see also Texas v. Johnson*, 491 U.S. 397, 412 (1989) (determining criminal prosecution of a protestor burning an American flag constitutes content restriction); *Pickup*, 740 F.3d at 1216 (O'Scannlain, J., dissenting) ("In other words, the government's ipse dixit cannot transform 'speech' into 'conduct' that it may more freely regulate."). If regulations on conduct are still found to be essentially content-based restrictions, they cannot fall under *O'Brien*. *Holder*, 561 U.S. at 28.

The most famous application of the *O'Brien* distinction to the medical context is perhaps *Planned Parenthood v. Casey*, which, in part, concerned informed consent requirements for abortion. *See Casey*, 505 U.S. at 844 (analyzing the First

Amendment applied to compelled informed consent disclosures for abortions). The Court in that case held that state governments may require informed consent disclosures for medical procedures, even for controversial procedures like abortion. *Id.* at 882. In *NIFLA*, the Court refined this holding, stating that the informed consent or other mandated speech must be “tied to a procedure,” and that speech restrictions which were applied to a patient-doctor relationship generally were not merely incidental to the conduct regulated. 138 S. Ct. at 2373. In other words, statutes limiting patient-provider speech across all procedures are problematic because they are designed to restrict discussion of a certain content, as opposed to regulating the practice of a specific procedure. *Id.*; cf. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (invalidating a law banning certain communications between doctors and pharmaceutical detailers because it “does not simply have an effect on speech, but is directed at certain content . . .”); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (finding a ban on discussions about marijuana treatment between physicians and patients unconstitutional).

Respondent will urge the court to apply the *O’Brien* and *Casey* standards, finding that these are restrictions on speech “tied to a procedure,” namely, the procedures of SOCE and GICE. *NIFLA*, 138 S. Ct. at 2373. Relying on logic used by the *Pickup* court, Respondent will assert that “most, if not all, . . . mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment.” *Pickup*, 740 F.3d at 1229 (applying rational basis review since a SOCE ban was found to be a proscription only on conduct). Furthermore, the first amendment is not necessarily implicated when an illegal practice is carried out partially using words. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (“[I]t has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was . . . carried out by means of language . . .”). Here, the treatment being banned is the attempt to use talk therapy (or any therapy) to change an individual’s gender or sexual orientation. Talking about SOCE and GICE isn’t banned. *See Pickup*, 740 F.3d at 1229. Rather, the use of talking as a *tool* to change these characteristics is banned. *See id.* Again, it will help Respondent’s case that the statute specifically allows for the discussion of SOCE and GICE outside of the context of treatment—it is only the treatment that is forbidden by the statute, not any speech describing or advocating for the treatment. In this way, the statute more closely adheres to *NIFLA*’s treatment-specific requirement. *See NIFLA*, 138 S. Ct. at 2373.

**3. Petitioner will argue that the *Holder* standard should apply, and that statutes regulating therapist conduct may necessarily impede free speech.**

Petitioner will urge the Court to apply the *Holder* standard that content-based restrictions on speech, even if related to some conduct, are nevertheless subject to strict scrutiny. *Holder*, 561 U.S. at 28. They may cite to *Conant v. Walters*, which held

that restrictions on conversations between doctors and patients about marijuana were unconstitutional. *Conant*, 309 F.3d at 639. The circuit court in *Conant* applied strict scrutiny instead of intermediate scrutiny and found that an attempt to “punish physicians on the basis of the content of doctor-patient communications” was unconstitutional. *Id.* at 637. Extending *Conant*’s proposition that doctor-patient communications are not outside of the First Amendment’s protections, *NIFLA* suggested that doctors may have disagreements with each other and the government about treatment, and should be able to discuss these disagreements with their patients. *See* 138 S. Ct. at 2375 (“Doctors and nurses might disagree about . . . the benefits of medical marijuana . . .”).

Petitioner may also point out that even the *King* court, in upholding a SOCE ban, asserted that talk therapy must be analyzed as speech under the First Amendment and *Holder. King*, 767 F.3d at 224–25 (disagreeing with the *Pickup* court’s application of a conduct-based *O’Brien* approach). The Eleventh Circuit also took this approach in *Otto*, 981 F.3d at 865 (“If SOCE is conduct, the same could be said of teaching or protesting—both are activities, after all. Debating? Also an activity.”). As for the portion of the statute expressly allowing discussion of SOCE outside the therapeutic context, Petitioner will once again apply the reasoning of the *Otto* court—if therapists cannot speak in the context that matters most to them, there can be no more significant restriction on their First Amendment rights. *See Otto*, 981 F.3d at 863. This will also be supported by the Supreme Court’s assertion in *NIFLA* that patient-provider conversations are part of the marketplace of ideas that the First Amendment is designed to protect. *NIFLA*, 138 S. Ct. at 2375.

## **II. Parties Will Argue Whether the Statute Survives Under the Respective Level of Judicial Scrutiny.**

Respondent will argue that the statute survives under intermediate scrutiny. But, even if strict scrutiny applies, it should also survive because the State of Steubensia has a strong interest in protecting the welfare of children, as supported by rigorous legislative findings and consensus within the state’s medical and psychological communities. *See* Ex. B, C. Petitioner will argue that, under intermediate scrutiny, the Government has not clearly connected the statute to its stated purpose. Similarly, Petitioner will argue that, under strict scrutiny, the Government has not established that the statute actually protects the psychological welfare of children.

### **A. Intermediate Scrutiny**

To satisfy First Amendment intermediate scrutiny under the *O’Brien* standard regulating “speech incidental to conduct,” a challenged statute must further an interest within the government’s power, that such interest is unrelated to free expression, and that there is not a less restrictive alternative. *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

**1. Under intermediate scrutiny, Respondent will point to the reasonable inferences the legislature drew from its findings.**

If Respondent is able to successfully make the argument for intermediate scrutiny (most likely by using the *O'Brien* “speech incidental to regulated conduct” standard outlined above), then the statute will be constitutional under the First Amendment if, “(1) the interest served is within the power of the government; (2) the regulation furthers that interest; (3) the interest served is unrelated to free expression; and (4) there is no less restrictive alternative.” *Sammy’s of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996 (citing *O’Brien*, 391 U.S. at 377). This is a less demanding standard, and it is much more likely that Respondent would win, as those defending SOCE bans under intermediate scrutiny or lesser standards have done so in the past. *See King v. Governor of N.J.*, 767 F.3d 216, 234 (3d Cir. 2014) (applying intermediate scrutiny to professional speech due to its similarities with commercial speech); *see also Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014) (applying rational basis review to a SOCE ban because it was seen as purely regulating conduct). A reviewing court need not second guess lawmakers; it must only determine that the legislature made “reasonable inferences” from “substantial evidence.” *Turner Broad Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 195 (1997).

Respondent will argue that the interests served are the protection of LGBTQ+ people’s mental and social well-being, and Steubensian citizens generally from harmful or fraudulent professional practices. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (highlighting the state interest in regulating professional practice). The regulation furthers these interests, at least to some extent—it would prevent professional practices which the legislature has at least some evidence to believe are both unfounded and dangerous to LGBTQ+ people. In support of this belief, the legislature has gathered reports from within the State of Steubensia, the support and research of large professional medical organizations, and the experience of other governments. *See Sammy’s*, 140 F.3d at 997 (“experience of other cities . . . is sufficient.”). Furthermore, by completely banning the practice from which the reported harms stem, this regulation would “alleviate [those] harms in a direct and material way.” *Turner Broad Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 664 (1994).

Respondent will also argue that the state’s interest is not simply to restrict speech about the mutability of sexual orientation and gender, but instead to prevent the psychological harms that SOCE and GICE cause. *Cf. Sammy’s*, 140 F.3d at 997 (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570 (1991)) (discussing a statute where the interest was found not to prevent the expressive conduct of erotic dancing, but the “evil of public nudity”). Finally, by allowing for broad discussion outside the therapeutic context, and a clergy exemption, the state has demonstrated care in ensuring that this is not more extensive than necessary. *See Greater New Orleans*

*Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (not requiring the government to “employ the least restrictive means conceivable,” but requiring demonstration of some narrow tailoring).

**2. Petitioner will attack the connection between the regulation and its stated purpose to show that it cannot survive intermediate scrutiny.**

Under intermediate scrutiny, Petitioner will find it more difficult to make their case; the government interest in protecting children is clearly established and it is unclear that SOCE/GICE can be prevented by anything other than an outright ban. Petitioner may argue however that the connection between the regulation and the purported interest is tenuous and unfounded. *See Pitt News v. Pappert*, 379 F.3d 96, 107 (3d Cir. 2004) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)) (requiring more than “mere speculation or conjecture”). To succeed with this claim, they would have to show that the legislature did not draw a reasonable inference from professional society’s reports, which seems farfetched as both these organizations recommended bans on SOCE and GICE after examining a wide breadth of psychological data. *See King*, 767 F.3d at 239 (finding that a legislature does not need to wait for conclusive evidence to protect citizens from serious threats).

Petitioner may find more success in arguing that the connection between the regulation and purported interest fails for under-inclusivity. Since many patients and providers will be granted clergy exemptions, it is unclear how this law will operate except to punish secular providers for their speech. *Cf. Nat’l Inst. of Fam. and Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (finding that broad exemptions for certain clinics may indicate “a disconnect between [a statute’s] stated purpose and its actual scope”).

**B. Strict Scrutiny**

Under the Court’s test for strict scrutiny, Respondent will need to show that the statute is narrowly tailored to a compelling government interest, while Petitioner need merely show that either the government’s interests are not compelling, or the statute is inadequately tailored to meet the stated interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015).

**1. Under strict scrutiny, Respondent will point to the state’s serious compelling interest and its rigorous findings**

Under the more demanding standards for content- and viewpoint- based restrictions, both Petitioner and Respondent would make similar arguments, but the Government would be held to a higher standard. *See supra* at 5–6 (describing strict scrutiny and *per se* unconstitutionality). At a minimum, Respondent would need to prove that their interest was a “compelling one,” and that the statute was “narrowly

tailored” to that interest. *Reed*, 576 U.S. at 171 (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). If this is a viewpoint restriction, there may almost be no argument at all for constitutionality. See *Rosenberger*, 515 U.S. at 829; but see *Morse*, 551 U.S. at 410 (allowing viewpoint restrictions in school speech context to protect children from serious harm).

To show a compelling interest, Respondent will point again to the seriousness of complications arising from SOCE and GICE, as well as the reports and data supporting bans on these practices. The psychological welfare of children has been accepted as a compelling state interest, and Petitioner would probably not contest that. *New York v. Ferber*, 458 U.S. 747, 756–7 (1982); see also *Otto*, 981 F.3d at 868 (not contesting the interest in protecting children, though noting this does not include protecting children from all possible ideas).

Thus, the strict scrutiny case would depend on whether Respondent can show that the statute is narrowly tailored to the interest of protecting LGBTQ+ children’s welfare. To show narrow tailoring, Respondent would first need to show that the ban actually protects the psychological welfare of children. They would do this by pointing to empirical evidence cited by the legislature, as well as the experience of other governments and official testimony. To show that the tailoring was sufficiently narrowed, they could point again to allowances for broad discussion of SOCE and GICE outside of the therapeutic context, as well as the clergy exemption.

**2. Petitioner will ask the Court to follow *Otto* in arguing that there is not enough data to support a SOCE or GICE ban under strict scrutiny.**

Petitioner has the easier argument if the Court applies strict scrutiny, particularly if it is strict scrutiny applied to a viewpoint-based restriction. See *Rosenberger*, 515 U.S. at 829. Petitioner will argue that there is simply not enough data to conclusively show that banning SOCE and GICE protects children’s social and psychological welfare, relying primarily on the reasoning of the *Otto* court as applied to talk-therapy SOCE. See *Otto*, 981 F.3d at 869. The APA report concedes a “complete lack’ of rigorous recent research[,]” which could support the conclusion that governments do not have enough information about the efficacy of SOCE therapies to ban them. *Id.* (citing *AMA Issue Brief*, *supra* note 1).

Petitioner may also make a policy argument against deference to the APA and AMA, cautioning courts against giving absolute deference to the opinions of professional organizations. They will likely cite to the *NIFLA* opinion’s emphasis on preserving the marketplace of ideas, even within the doctor-patient context. 138 S. Ct. at 2375. They may borrow the *Otto* court’s reasoning that the APA had previously classified homosexuality as a disorder, undermining the legitimacy of professional consensus. *Otto*, 981 F.3d at 869–70.

### CONCLUSION

This case presents a novel question: given the Supreme Court’s recent hostility to “professional speech” exemptions in *NIFLA*, is it at all possible to design a SOCE or GICE ban that can withstand judicial scrutiny? Steubensia’s law provides generous exemptions and attempts to carefully skirt the issue of free expression, but it may be impossible to prohibit certain “talk therapies” without implicating the protections of the First Amendment. Respondent can succeed by highlighting the extreme dangers of SOCE and GICE, emphasizing Steubensia’s additional protections for opposing viewpoints, and relying on the nature of therapy as “conduct” to lessen First Amendment protections. Petitioner can succeed by asserting that talk therapy is nothing other than speech, and by showing that legislatures need more information about SOCE and GICE before instituting broad prohibitions on free expression in the patient-therapist relationship.

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## Bar Admission

## Prior Judicial Experience

Judicial Internships/Externships **Yes**